



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



# *The green bag*

Horace Williams Fuller, Sydney Russell Wrightington, Arthur  
Weightman Spencer, Thomas Tileston Baldwin













9291  
THE  
GREEN BAG

*An Entertaining Magazine for Lawyers*

EDITED BY THOS. TILESTON BALDWIN

VOLUME XIV  
COVERING THE YEAR  
1902

THE BOSTON BOOK COMPANY  
BOSTON, MASS.

COPYRIGHT, 1902  
BY THE BOSTON BOOK CO.

**LIBRARY OF THE  
LELAND STANFORD, JR., UNIVERSITY  
LAW DEPARTMENT.**

Press of C. H. HEINTZEMANN, Boston, U. S. A.

## VOLUME XIV.

LIST OF PORTRAITS . . . . .	III
LIST OF ILLUSTRATIONS . . . . .	IV
TITLE INDEX . . . . .	V
INDEX TO BOOK REVIEWS . . . . .	XII
INDEX TO EDITORIALS . . . . .	XIV
INDEX TO NOTES . . . . .	XIV
AUTHORS' INDEX . . . . .	XVIII

### LIST OF PORTRAITS.

	PAGE		PAGE
ARNOLD, JONATHAN E. <i>Frontispiece</i> . . . . .	305	HANNEN, LORD . . . . .	30
ARNOLD, MICHAEL . . . . .	177	HARRIS, CARLYLE W. . . . .	39
BENHAM, REAR ADMIRAL . . . . .	99	HARRISON, BENJAMIN. <i>Frontispiece</i> . . . . .	49
BURR, AARON. <i>Frontispiece</i> . . . . .	451	HERNANDEZ, JOSÉ C. . . . .	189
CARY, JOHN W. <i>Frontispiece</i> . . . . .	507	HERSCHELL, LORD . . . . .	70
CHASE, SALMON PORTLAND. <i>Frontispiece</i> . . . . .	155	LEMLEY, JUDGE ADVOCATE GENERAL . . . . .	103
DAVEY, LORD . . . . .	31	LOUIS XIV. . . . .	277
DEWEY, ADMIRAL . . . . .	99	MACLEARY, JAMES H. . . . .	191
FIELD, LORD . . . . .	29	MAINTENON, MADAME DE . . . . .	281
FIGUERAS, JOSÉ M. . . . .	190	MONTESPAN, MADAME DE . . . . .	279
GRAY, HORACE. <i>Frontispiece</i> . . . . .	403	O'HAGAN, LORD . . . . .	28
GREEN, JAMES S. <i>Frontispiece</i> . . . . .	205	PARKER, JAMES . . . . .	127
HALSBURY, LORD . . . . .	73	POTTS, HELEN . . . . .	41
HANNA, SOLICITOR . . . . .	121	QUINONES, JOSÉ S . . . . .	187

92094

	PAGE		PAGE
RAMSAY, REAR ADMIRAL . . . . .	99	TEAGUE, MERRILL A. . . . .	143
RAYNOR, ISIDOR . . . . .	115	VALLIÈRE, M'LE DE LA . . . . .	278
RUSSELL, SIR CHARLES . . . . .	167	VARGA, FRANCIS . . . . .	435
SCHLEY COURT OF INQUIRY, THE. <i>Frontispiece</i> . . . . .	99	VOORHEES, DANIEL W. . . . .	355
SELBORNE, LORD . . . . .	26	WAITE, MORRISON REMICK. <i>Frontispiece</i> . . . . .	257
SULZBACHER, LOUIS . . . . .	188	WARD, LIEUTENANT . . . . .	135
TANEY, ROGER BROOKE. <i>Frontispiece</i> . . . . .	1, 559	WATSON, LORD . . . . .	33
		WILSON, JEREMIAH M. . . . .	109

## LIST OF ILLUSTRATIONS.

	PAGE		PAGE
BASTILLE, THE . . . . .	217	OLD HIE KIRK OF GLASGOW, THE . . . . .	417
<i>DOCTRINA PLACITANDI</i> , Title-page of . . . . .	584	ORIEL WINDOW OF THE LIBRARY OF THE MIDDLE TEMPLE . . . . .	477
DUEL CONCERNING THE HONOR OF LADIES . . . . .	323	PALACE OF PARIS AS IT WAS IN THE SIX- TEENTH CENTURY, THE . . . . .	221
FIGHT BETWEEN RAYMBAULT DE MORUEIL AND GUYON DE LOSENNE . . . . .	322	PALAIS DE JUSTICE, LE, PARIS . . . . .	526
GREAT CHÂTELET OF PARIS, THE . . . . .	219	PARLIAMENT CHAMBER AND THE GARDEN AT THE SIDE OF THE LIBRARY OF THE MIDDLE TEMPLE, THE . . . . .	478
HALL OF THE MIDDLE TEMPLE . . . . .	480	PRESIDENT OF COURT OF APPEAL . . . . .	529
"HOW BOTH PARTIES ARE OUT OF THEIR TENTS, ARMED AND READY TO DO THEIR DUTY AT THE SIGNAL FROM THE MAR- SHAL, WHO HAS THROWN THE GLOVE" . . . . .	327	PROCUREUR-GÉNÉRAL . . . . .	531
"HOW THE PLAINTIFF AND THE DEFEND- ANT TAKE THE FINAL OATH BEFORE THE JUDGE" . . . . .	325	QUESTION EXTRAORDINARY, THE . . . . .	223
JUDICIAL DUEL, THE. COMBAT OF A KNIGHT WITH A DOG . . . . .	333	SINGLE COMBAT TO BE DECIDED BY THE JUDGMENT OF GOD . . . . .	329
JUDICIAL DUEL, THE. THE PLAINTIFF OPENING HIS CASE BEFORE THE JUDGE . . . . .	331	TEMPLE CHURCH, THE . . . . .	483
LIBRARY OF THE MIDDLE TEMPLE, THE . . . . .	474	TORTURE OF THE BOOT, THE . . . . .	225
		TORTURE OF THE WHEEL, THE . . . . .	226
		TRIAL OF A PIG AT LAUSANNE IN THE FOURTEENTH CENTURY . . . . .	377
		WATER TORTURE, THE . . . . .	227

## TITLE INDEX.

	PAGE
Ambulance Chaser, The Evolution of the (verse) . . . . .	<i>L. G. Smith</i> . . . . . 263
American Bastille, The . . . . .	<i>George F. Ormsby</i> . . . . . 520
Analysis of the Holmes Case, An (illustrated) . . . . .	<i>Michael Arnold</i> . . . . . 176
Ancient Ireland, Judicial Oaths in . . . . .	<i>Joseph M. Sullivan</i> . . . . . 85
Ancient Reflected through Modern (verse) . . . . .	<i>J. B. Mackenzie</i> . . . . . 519
Animals in Court . . . . .	<i>M. E. E. Kerr</i> . . . . . 264
Animals, Lawsuits Against . . . . .	. . . . . 471
Arnold, Jonathan E.: A Great <i>Nisi Prius</i> Lawyer of the West (with portrait) . . . . .	<i>Duane Mowry</i> . . . . . 305
Attorney? Was Shakespeare Bound to an . . . . .	<i>J. B. Mackenzie</i> . . . . . 58
Barrister, Charles Russell, . . . . .	<i>Bruce Wyman</i> . . . . . 166
Barrister's Shakespeare, The . . . . .	. . . . . 525
Bastille, The American . . . . .	<i>George F. Ormsby</i> . . . . . 520
Battle, Wager of (illustrated) . . . . .	<i>M. S. Gilpatric</i> . . . . . 321
Bengal, Reminiscences of the Mafassal Law Courts of	<i>Andrew T. Sibbald</i> . . . . . 337
Biblical Law, A Lawyer's Studies in. <i>See</i> Lawyer's Studies in Biblical Law, A.	
Black Eagle Case, The . . . . .	<i>Lee M. Friedman</i> . . . . . 63
Black Maria, The . . . . .	<i>John De Morgan</i> . . . . . 183
Bowen, Lord . . . . .	<i>E. M.</i> . . . . . 488
Brinvilliers Case, The Sainte Croix-de (illustrated) . . . . .	<i>H. Gerald Chapin</i> . . . . . 216
Burr, Aaron, as a Lawyer (with portrait) . . . . .	<i>Eugene L. Didier</i> . . . . . 451
California, Lynch Law in . . . . .	<i>John G. Jury</i> . . . . . 291
Cary, John W.: A Great Corporation Lawyer (with portrait)	<i>Duane Mowry</i> . . . . . 507
Case, A Notable . . . . .	. . . . . 415
Case, An Analysis of the Holmes (illustrated) . . . . .	<i>Michael Arnold</i> . . . . . 176
Case, McCarty Won his (verse) . . . . .	<i>Cornelius B. Palmer</i> . . . . . 432
Case of Dr. Cream, The Strange . . . . .	<i>H. Gerald Chapin</i> . . . . . 426
Case, The Black Eagle . . . . .	<i>Lee M. Friedman</i> . . . . . 63
Case, The Final Trial of the Sifton Murder . . . . .	. . . . . 600
Case, The Sainte Croix-de Brinvilliers . . . . .	<i>H. Gerald Chapin</i> . . . . . 216
Cases from the Old English Law Reports . . . . .	<i>Max A. Robertson.</i> . . . .
III. Contracts Impossible of Performance . . . . .	" " . . . . . 184
Century of English Judicature, A, XI, XII (illustrated) . . . . .	<i>Van Vechten Veeder</i> . . . . . 27, 71
Chase, Salmon Portland (with portrait) . . . . .	<i>Francis R. Jones</i> . . . . . 155
Chaser, The Evolution of the Ambulance (verse) . . . . .	<i>L. G. Smith</i> . . . . . 263
Chief Justice Taney (with portrait) . . . . .	<i>John A. Shauck</i> . . . . . 559
Chinese Law, Landmarks of, I-III . . . . .	<i>Vincent Van Marter Beede</i> . . . . . 466, 534, 578
Chinese Police . . . . .	<i>Andrew T. Sibbald</i> . . . . . 284
Christian Law, Women under Early . . . . .	<i>R. Vashon Rogers</i> . . . . . 539
Christianity and the Common Law . . . . .	<i>Arthur William Barber</i> . . . . . 267
Claims, The Court of . . . . .	. . . . . 79
Coal Mines and the Law, The . . . . .	<i>Bruce Wyman</i> . . . . . 514
Coal Mines, A Word More as to the . . . . .	<i>H. W. Chaplin</i> . . . . . 570
Code of the United States, The Proposed Penal . . . . .	<i>Gino Carlo Speranza</i> . . . . . 12



	PAGE
Coke, A Posthumous Work of Lord . . . . .	585
Common Law, Christianity and the . . . . .	<i>Arthur William Barber</i> . . . . . 267
Conditions in Island of Negros, Legal . . . . .	<i>W. F. Norris</i> . . . . . 19
Constitution and Religion, The . . . . .	<i>Solomon Mendels</i> . . . . . 411
Contract, A Novel . . . . .	459
Control of "Trusts," The . . . . .	<i>Harry Earl Montgomery</i> . . . . . 460
Could Show it if Necessary . . . . .	<i>Jonas Jutton</i> . . . . . 335
Counsellor McCann (verse) . . . . .	<i>C. B. Palmer</i> . . . . . 175
Court, Animals in . . . . .	<i>M. E. E. Kerr</i> . . . . . 264
Court, Ghosts in . . . . .	" " . . . . . 172
Court of Claims, The . . . . .	79
Court of Louis XIV., The Poison Drama at the (illustrated)	<i>John De Morgan</i> . . . . . 276
Court of Porto Rico, The Supreme (illustrated) . . . . .	186
Court Room, A Kentucky . . . . .	<i>Enoch Johnson</i> . . . . . 318
Courts, Military. <i>See</i> Legal View of the Inquiry Granted to Rear-Admiral Schley, A . . . . .	99
Courts of Bengal, Reminiscences of the Mafassal Law . . . . .	<i>Andrew T. Sibbald</i> . . . . . 337
Cream, The Strange Case of Dr. . . . .	<i>H. Gerald Chapin</i> . . . . . 426
Crime, A Sequence in (illustrated) . . . . .	" " . . . . . 36
Criminal Trials, Early, IV . . . . .	386
Curious Nullity Suit of the Thirteenth Century, A . . . . .	<i>Beulah Brylawski Amram</i> . . . . . 383
Decision, A Philippine . . . . .	<i>Arthur F. Odlin</i> . . . . . 274
Development of Trial by Jury . . . . .	<i>E. C. Lawrence</i> . . . . . 239
Disputed Guardianship, A Question of . . . . .	<i>Adolph Moses</i> . . . . . 598
Ditties, Legal (verse) . . . . .	549
Divorces while You Wait, European . . . . .	<i>J. H. Beale, Jr.</i> . . . . . 9
<i>Doctrina Placitandi</i> (illustrated) . . . . .	<i>E. Allen Frost</i> . . . . . 584
Eagle Case, The Black . . . . .	<i>Lee M. Friedman</i> . . . . . 63
Early Christian Law, Women under . . . . .	<i>R. Vashon Rogers</i> . . . . . 539
Early Criminal Trials, IV . . . . .	386
Early English Procedure . . . . .	<i>M. E. E. Kerr</i> . . . . . 592
Early English Soap Laws, Quaint . . . . .	<i>L. G. Smith</i> . . . . . 368
Editorial Department . . . . . 45, 87, 149, 199, 249, 297, 347, 397, 445, 497, 553, 607	
Edwards, The Wool-sack and Woolens in the Reigns of the Earlier . . . . .	<i>L. G. Smith</i> . . . . . 595
English Judicature, A Century of, XI, XII (illustrated) . . . . .	<i>Van Vechten Veeder</i> . . . . . 27, 71
English Jury Box, The Humors of the . . . . .	<i>Lawrence Irwell</i> . . . . . 228
English Law Reports, Cases from the Old. <i>See</i> Cases from the Old English Law Reports.	
English Prison Rules and Remission of Sentences for Good Conduct . . . . .	<i>John Miller</i> . . . . . 605
English Procedure, Early . . . . .	<i>M. E. E. Kerr</i> . . . . . 592
English Soap Laws, Quaint Early . . . . .	<i>L. G. Smith</i> . . . . . 368
European Divorces while You Wait . . . . .	<i>J. H. Beale, Jr.</i> . . . . . 9
Evidence, The Victim in . . . . .	<i>Henry Burns Geer</i> . . . . . 283
Evolution of the Ambulance Chaser, The (verse) . . . . .	<i>L. G. Smith</i> . . . . . 263
Experience, A Strange . . . . .	<i>John De Morgan</i> . . . . . 76
Extradition . . . . .	<i>Lawrence Irwell</i> . . . . . 314
Fiction, The Law as Treated in . . . . .	<i>Allan R. Campbell</i> . . . . . 364
Fight for Primitive Rights, A . . . . .	<i>Henry Burns Geer</i> . . . . . 486
Final Trial of the Sifton Murder Case, The . . . . .	600
Fleet Marriages . . . . .	<i>Vincent Van Marter Beede</i> . . . . . 234
France, How Torture was Abolished in . . . . .	<i>George H. Westley</i> . . . . . 35
France, The Judicial System of (illustrated) . . . . .	<i>Lawrence Irwell</i> . . . . . 527

	PAGE
Gentlemen of the Jury . . . . .	<i>Douglas Malloch</i> . . . . . 16
Ghosts in Court . . . . .	<i>M. E. E. Kerr</i> . . . . . 172
Gilbertian Lawyers . . . . .	. . . . . 603
Glasgow, Queer Laws of Mediæval (illustrated)	<i>William E. Johnson</i> . . . . . 416
Good Conduct, English Prison Rules and Remission of Sentences for . . . . .	<i>John Miller</i> . . . . . 605
Good Witness Himself, Was a . . . . .	<i>Jonas Jutton</i> . . . . . 533
Government, Public Reform and Municipal . . . . .	<i>Duane Mowry</i> . . . . . 209
Grave Problem, A . . . . .	<i>Wm. Archibald McClean</i> . . . . . 586
Gray, Horace (with portrait) . . . . .	<i>Francis R. Jones</i> . . . . . 403
Great Lawyers, and How they Won . . . . .	<i>William G. Peckham</i> . . . . . 173
Great Seal of the United States, The . . . . .	. . . . . 440
Great Seal, The Story of the . . . . .	. . . . . 392
Green, James S. (with portrait) . . . . .	<i>Charles W. Sloan</i> . . . . . 205
Guardianship, A Question of Disputed . . . . .	<i>Adolph Moses</i> . . . . . 598
Harrison, Benjamin, as a Lawyer and an Orator (with portrait)	<i>W. W. Thornton</i> . . . . . 49
Holmes Case, An Analysis of the (illustrated) . . . . .	<i>Michael Arnold</i> . . . . . 176
Holmes' Plots and Strategy, Sherlock . . . . .	<i>J. B. Mackenzie</i> . . . . . 407
How Torture was Abolished in France . . . . .	<i>George H. Westley</i> . . . . . 35
Humors of the English Jury Box, The . . . . .	<i>Lawrence Irwell</i> . . . . . 228
Identity, Mistaken . . . . .	. . . . . 423
"In the Matter of Rest" . . . . .	<i>Granville I. Chittenden</i> . . . . . 336
Indian Jails . . . . .	<i>Andrew T. Sibbald</i> . . . . . 437
Inquiries by Military Courts. <i>See</i> Legal View of the Inquiry	
Granted to Rear-Admiral Schley, A . . . . .	. . . . . 99
Inquiry Granted to Rear-Admiral Schley. <i>See</i> Legal View	
of the Inquiry Granted to Rear-Admiral Schley, A . . . . .	. . . . . 99
Ireland, Judicial Oaths in Ancient . . . . .	<i>Joseph M. Sullivan</i> . . . . . 85
Island of Negros, Legal Conditions in . . . . .	<i>W. F. Norris</i> . . . . . 19
Jails, Indian . . . . .	<i>Andrew T. Sibbald</i> . . . . . 437
Judicature, A Century of English, XI, XII (illustrated) . . . . .	<i>Van Vechten Veeder</i> . . . . . 27, 71
Judicial Oaths in Ancient Ireland . . . . .	<i>Joseph M. Sullivan</i> . . . . . 83
Judicial System of France, The (illustrated) . . . . .	<i>Lawrence Irwell</i> . . . . . 527
Juries and their Verdicts . . . . .	<i>John De Morgan</i> . . . . . 395
Jurisdiction, A Question of . . . . .	<i>Henry Burns Geer</i> . . . . . 548
Jury Box, The Humors of the English . . . . .	<i>Lawrence Irwell</i> . . . . . 228
Jury, Development of Trial by . . . . .	<i>E. C. Lawrence</i> . . . . . 239
Jury, Gentlemen of the . . . . .	<i>Douglas Malloch</i> . . . . . 16
Jury System in Porto Rico, The . . . . .	<i>E. L. MacRay</i> . . . . . 420
Jury, The . . . . .	<i>David J. Brewer</i> . . . . . 67
Justice, The Soul of (verse) . . . . .	<i>I. Jay Potter</i> . . . . . 320
Kentucky Court Room, A . . . . .	<i>Enoch Johnson</i> . . . . . 318
Kettle, The Trial of Lady Alice . . . . .	<i>Joseph M. Sullivan</i> . . . . . 433
Kidnapping of the President, The . . . . .	<i>J. H. Rockwell</i> . . . . . 214
Lady Alice Kettle, The Trial of . . . . .	<i>Joseph M. Sullivan</i> . . . . . 433
Landmarks of Chinese Law, I-III . . . . .	<i>Vincent Van Marter Beede</i> . . . . . 466, 534, 578
Law, A Lawyer's Studies in Biblical. <i>See</i> Lawyer's Studies	
in Biblical Law, A. . . . .	
Law, A Question of (verse) . . . . .	<i>E. S.</i> . . . . . 465
Law as Treated in Fiction, The . . . . .	<i>Allan R. Campbell</i> . . . . . 364

	PAGE
Law, Christianity and the Common . . . . .	<i>Arthur William Barber</i> . . . . . 267
Law Courts of Bengal, Reminiscences of the Mafassal . . . . .	<i>Andrew T. Sibbald</i> . . . . . 337
Law in California, Lynch . . . . .	<i>John G. Jury</i> . . . . . 291
Law in Texas in the Sixties, Lynch . . . . .	<i>J. C. Terrell</i> . . . . . 382
Law, Landmarks of Chinese, I-III . . . . .	<i>Vincent Van Marter Beede</i> . . . . .
Law Reports, Cases from the Old English. <i>See</i> Cases from the Old English Law Reports. . . . .	466, 534, 578
Law, The Coal Mines and the . . . . .	<i>Bruce Wyman</i> . . . . . 514
Law, Women under Early Christian . . . . .	<i>R. Varshon Rogers</i> . . . . . 539
Laws of Mediæval Glasgow, Queer (illustrated) . . . . .	<i>William E. Johnson</i> . . . . . 416
Laws, Quaint Early English Soap . . . . .	<i>L. G. Smith</i> . . . . . 368
Laws, Some Peculiar . . . . .	<i>Solomon Mendels</i> . . . . . 576
Lawsuits against Animals . . . . .	. . . . . 471
Lawyers, Gilbertian . . . . .	. . . . . 603
Lawyers, Great, and How they Won . . . . .	<i>William G. Peckham</i> . . . . . 173
Lawyer's Patron Saint . . . . .	<i>John De Morgan</i> . . . . . 443
Lawyer's Studies in Biblical Law, A . . . . .	<i>David Werner Amram</i> . . . . .
Family Solidarity . . . . .	" " . . . . . 490
Patriarchal Family, The . . . . .	" " . . . . . 83
Position of Women, The . . . . .	" " . . . . . 343
Powers of the Patriarch, The . . . . .	" " . . . . . 231
Legal Conditions in Island of Negros . . . . .	<i>W. F. Norris</i> . . . . . 19
Legal Ditties . . . . .	. . . . . 549
Legal Letter, London. <i>See</i> London Legal Letter. . . . .	
Legal Status of the Mother-in-Law, The . . . . .	<i>Charles N. Travous</i> . . . . . 25
Legal Study of St. Patrick, A . . . . .	<i>Joseph M. Sullivan</i> . . . . . 265
Legal View of the Inquiry Granted to Rear-Admiral Schley and of Other Inquiries by Military Courts, A (illustrated) . . . . .	<i>Charles E. Grinnell</i> . . . . . 90
Conflicting Principles, 100. Courts of Inquiry, 102. Dewey's Dissent, 108. Sampson's Equity, 114. Right to Exclude, 118. Open Sessions, 120. Appeal to the President, 122. Exclusion of Command, 123. Task of Judge Advocate, 125. Bias in Examinations, 126. Ingenuity in Advocacy, 128. Evidence of Opinion, 129. Hearsay Evidence, 131. Cross Examination, 132. Court's Attention, 133. Court's Control, 133. Instructing the Court, 134. Points of Practice, 134. Naval Peculiarities, 136. Disqualifying Howison, 136. Rulings and Arguments, 141. Characteristic Powers, 142. Value of the Case, 144. Legal Results, 145.	
Letter, London Legal. <i>See</i> London Legal Letter. . . . .	
Library of the Middle Temple, The (illustrated) . . . . .	<i>Edward Manson</i> . . . . . 475
Lincoln, Abraham . . . . .	<i>Joseph H. Choate</i> . . . . . 77
Literary Notes . . . . .	92, 153, 253, 302, 350, 401, 505, 557, 612
London Legal Letter . . . . .	<i>Stuff Gown</i> . . . . .
Knowledge of Ecclesiastical Law by the Bench. A Forgery Case. Proposed Patent Act. . . . .	" " . . . . . 197
Claims against, and Amounts Paid by, the English Government, in Cases of Wrongful Arrest and Deportation by Military Authorities in South Africa . . . . .	" " . . . . . 246
Criminal Procedure. Uniformity of Sentences for Same Offences. Theory of Punishment . . . . .	" " . . . . . 294
Mr. Bretherton's Gift to the Bar Library. Scarcity of American Reports and Text-books in English Law Libraries . . . . .	" " . . . . . 494
Need of Women Lawyers in India. The Number and Pay of Judges. Naturalization Laws . . . . .	" " . . . . . 550
Lord Bowen . . . . .	<i>E. M.</i> . . . . . 488
Louis XIV., The Poison Drama at the Court of (illustrated) . . . . .	<i>John De Morgan</i> . . . . . 276

	PAGE
Lynch Law in California . . . . .	John G. Jury . . . . . 291
Lynch Law in Texas in the Sixties . . . . .	J. C. Terrell . . . . . 382
Mafassal Law Courts of Bengal, Reminiscences of the . . . . .	Andrew T. Sibbald . . . . . 337
Maria, The Black . . . . .	John De Morgan . . . . . 183
Market Value of Speech, The . . . . .	Wm. Archibald McClean . . . . . 369
Marriages, Fleet . . . . .	Vincent Van Marter Beede . . . . . 234
Marshall Memorial Tablet, The . . . . .	Maria Newton Marshall . . . . . 372
Matter of Rest," "In the . . . . .	Granville I. Chittenden . . . . . 336
McCann, Counsellor (verse) . . . . .	Cornelius B. Palmer . . . . . 175
McCarty Won his Case (verse) . . . . .	" " . . . . . 432
Mediaeval Glasgow, Queer Laws of (illustrated) . . . . .	William E. Johnson . . . . . 416
Memorial Tablet, The Marshall . . . . .	Maria Newton Marshall . . . . . 372
Mezzadria, The System of . . . . .	" " . . . . . 522
Middle Temple, The Library of the (illustrated) . . . . .	Edward Manson . . . . . 475
Military Courts. See Legal View of the Inquiry Granted to Rear-Admiral Schley, A . . . . .	" " . . . . . 99
Mines, A Word More as to the Coal . . . . .	H. W. Chaplin . . . . . 570
Mines and the Law, The Coal . . . . .	Bruce Wyman . . . . . 514
Mistaken Identity . . . . .	" " . . . . . 423
Modern, Ancient Reflected through (verse) . . . . .	J. B. Mackenzie . . . . . 519
Mother-in-Law, The Legal Status of the . . . . .	Charles N. Travous . . . . . 25
Municipal Government, Public Reform and . . . . .	Duane Mowry . . . . . 209
Murder Case, The Final Trial of the Sifton . . . . .	" " . . . . . 600
Negros, Legal Conditions in Island of . . . . .	W. F. Norris . . . . . 19
New Law Books . . . . . 47, 92, 154, 203, 255, 303, 352, 402, 448, 506, 556, 613	" " . . . . . 415
Notable Case, A . . . . .	" " . . . . . 415
Notes . . . . . 46, 89, 149, 200, 251, 299, 347, 397, 445, 501, 553, 607	" " . . . . . 459
Novel Contract, A . . . . .	" " . . . . . 459
Nullity Suit of the Thirteenth Century, A Curious . . . . .	Beulah Brylawski Amram . . . . . 383
Oaths in Ancient Ireland, Judicial . . . . .	Joseph M. Sullivan . . . . . 85
Old English Law Reports, Cases from the. See Cases from the Old English Law Reports.	
Patrick, A Legal Study of St. . . . .	Joseph M. Sullivan . . . . . 265
Patron Saint, The Lawyer's . . . . .	John De Morgan . . . . . 443
Peculiar Laws, Some . . . . .	Solomon Mendels . . . . . 576
Peers, Privileges of the . . . . .	George H. Westley . . . . . 341
Penal Code of the United States, The Proposed . . . . .	Gino Carlo Speranza . . . . . 12
Philippine Decision, A . . . . .	Arthur F. Odlin . . . . . 274
Pigs (illustrated) . . . . .	R. Vashon Rogers . . . . . 374
Placitandi, Doctrina (illustrated) . . . . .	E. Allen Frost . . . . . 584
Plots and Strategy, Sherlock Holmes' . . . . .	J. B. Mackenzie . . . . . 407
Poison Drama at the Court of Louis XIV., The (illustrated) . . . . .	John De Morgan . . . . . 276
Police, Chinese . . . . .	Andrew T. Sibbald . . . . . 284
Porto Rico, The Jury System in . . . . .	E. L. MacRay . . . . . 420
Porto Rico, The Supreme Court of (illustrated) . . . . .	" " . . . . . 186
Posthumous Work of Lord Coke, A . . . . .	" " . . . . . 585
President, The Kidnapping of the . . . . .	J. H. Rockwell . . . . . 214
Primitive Rights, A Fight for . . . . .	Henry Burns Geer . . . . . 486
Prison Rules and Remission of Sentences for Good Con- duct, English . . . . .	John Miller . . . . . 605
Privileges of the Peers . . . . .	George H. Westley . . . . . 341
Problem, A Grave . . . . .	Wm. Archibald McClean . . . . . 586
Procedure, Early English . . . . .	M. E. E. Kerr . . . . . 592

	PAGE
Proposed Penal Code of the United States, The . . . . .	<i>Gino Carlo Speranza</i> . . . . . 12
Public Reform and Municipal Government . . . . .	<i>Duane Mowry</i> . . . . . 209
Quaint Early English Soap Laws . . . . .	<i>L. G. Smith</i> . . . . . 368
Qualifications (verse) . . . . .	<i>Douglas Malloch</i> . . . . . 569
Queer Laws of Mediæval Glasgow (illustrated) . . . . .	<i>William E. Johnson</i> . . . . . 416
Question of Disputed Guardianship, A . . . . .	<i>Adolph Moses</i> . . . . . 598
Question of Jurisdiction, A . . . . .	<i>Henry Burns Geer</i> . . . . . 548
Question of Law, A (verse) . . . . .	<i>E. S.</i> . . . . . 465
Reform and Municipal Government, Public . . . . .	<i>Duane Mowry</i> . . . . . 209
Regrets (verse) . . . . .	. . . . . 66
Religion, The Constitution and . . . . .	<i>Solomon Mendels</i> . . . . . 411
Reminiscences of the Mafassal Law Court of Bengal . . . . .	<i>Andrew T. Sibbald</i> . . . . . 337
Remission of Sentences for Good Conduct, English Prison Rules and . . . . .	<i>John Miller</i> . . . . . 605
Reports, Cases from the Old English Law. <i>See</i> Cases from the Old English Law Reports. . . . .	
Rest," "In the Matter of . . . . .	<i>Granville I. Chittenden</i> . . . . . 336
Rights, A Fight for Primitive . . . . .	<i>Henry Burns Geer</i> . . . . . 486
Roost, A Solomon of the Turkey . . . . .	" " . . . . . 195
Rules, English Prison, and Remission of Sentences for Good Conduct . . . . .	<i>John Miller</i> . . . . . 605
Russell, Charles, Barrister (with portrait) . . . . .	<i>Bruce Wyman</i> . . . . . 166
Saint, The Lawyer's Patron . . . . .	<i>John De Morgan</i> . . . . . 443
St. Patrick, A Legal Study of . . . . .	<i>Joseph M. Sullivan</i> . . . . . 265
Sainte Croix-de Brinvilliers Case, The (illustrated) . . . . .	<i>H. Gerald Chapin</i> . . . . . 216
Schley, Rear-Admiral. <i>See</i> Legal View of the Inquiry Granted to Rear-Admiral Schley, A. . . . .	. . . . . 99
Seal of the United States, The Great . . . . .	. . . . . 440
Seal, The Story of the Great . . . . .	. . . . . 392
Sentences for Good Conduct, English Prison Rules and Remission of . . . . .	<i>John Miller</i> . . . . . 605
Sequence in Crime, A (illustrated) . . . . .	<i>H. Gerald Chapin</i> . . . . . 36
Shakespeare Bound to an Attorney? Was . . . . .	<i>J. B. Mackenzie</i> . . . . . 58
Shakespeare, The Barrister's . . . . .	. . . . . 525
Sherlock Holmes' Plots and Strategy . . . . .	<i>J. B. Mackenzie</i> . . . . . 407
Sifton Murder Case, The Final Trial of the . . . . .	. . . . . 600
Soap Laws, Quaint Early English . . . . .	<i>L. G. Smith</i> . . . . . 368
Solomon of the Turkey Roost, A . . . . .	<i>Henry Burns Geer</i> . . . . . 195
Some Peculiar Laws . . . . .	<i>Solomon Mendels</i> . . . . . 576
Soul of Justice, The (verse) . . . . .	<i>I. Jay Potter</i> . . . . . 320
Speech, The Market Value of . . . . .	<i>Wm. Archibald McClean</i> . . . . . 366
Status of the Mother-in-Law, The Legal . . . . .	<i>Charles N. Travous</i> . . . . . 25
Story of the Great Seal, The . . . . .	. . . . . 392
Strange Case of Dr. Cream, The . . . . .	<i>H. Gerald Chapin</i> . . . . . 426
Strange Experience, A . . . . .	<i>John De Morgan</i> . . . . . 76
Strategy, Sherlock Holmes' Plots and . . . . .	<i>J. B. Mackenzie</i> . . . . . 407
Studies in Biblical Law, A Lawyer's. <i>See</i> Lawyer's Studies in Biblical Law, A. . . . .	
Study of St. Patrick, A Legal . . . . .	<i>Joseph M. Sullivan</i> . . . . . 265
Suit of the Thirteenth Century, A Curious Nullity . . . . .	<i>Beulah Brylawski Amram</i> . . . . . 383
Supreme Court of Porto Rico, The (illustrated) . . . . .	. . . . . 186
System, The Jury, in Porto Rico . . . . .	<i>E. L. MacRay</i> . . . . . 420
System, The Judicial, of France (illustrated) . . . . .	<i>Lawrence Irwell</i> . . . . . 527
System of Mezzadria, The . . . . .	. . . . . 522

	PAGE
Tablet, The Marshall Memorial . . . . .	<i>Maria Newton Marshall</i> . . . . . 372
Taney, Chief Justice (with portrait) . . . . .	<i>John A. Shauck</i> . . . . . 559
Taney, Roger Brooke (with portrait) . . . . .	<i>Francis R. Jones</i> . . . . . I
Temple, The Library of the Middle (illustrated) . . . . .	<i>Edward Manson</i> . . . . . 475
Texas in the Sixties, Lynch Law in . . . . .	<i>J. C. Terrell</i> . . . . . 382
Thirteenth Century, A Curious Nullity Suit of the . . . . .	<i>Beulah Brylawski Amram</i> . . . . . 383
Torture was Abolished in France, How . . . . .	<i>George H. Westley</i> . . . . . 35
Trial by Jury, Development of . . . . .	<i>E. C. Lawrence</i> . . . . . 239
Trial of Lady Alice Kettle, The . . . . .	<i>Joseph M. Sullivan</i> . . . . . 433
Trial of the Sifton Murder Case, The Final . . . . .	. . . . . 600
Trials, Early Criminal, IV . . . . .	. . . . . 386
"Trusts," The Control of . . . . .	<i>Harry Earl Montgomery</i> . . . . . 460
Turkey Roost, A Solomon of the . . . . .	<i>Henry Burns Geer</i> . . . . . 195
United States, The Great Seal of the . . . . .	. . . . . 440
United States, The Proposed Penal Code of the . . . . .	<i>Gino Carlo Speranza</i> . . . . . 12
Value of Speech, The Market . . . . .	<i>Wm. Archibald McClean</i> . . . . . 369
Varga, Francis (illustrated) . . . . .	<i>F. G. Moorhead</i> . . . . . 434
Verdicts, Juries and their . . . . .	<i>John De Morgan</i> . . . . . 395
Verse:	
Ancient Reflected through Modern . . . . .	<i>J. B. Mackenzie</i> . . . . . 519
Counsellor McCann . . . . .	<i>Cornelius B. Palmer</i> . . . . . 175
Evolution of the Ambulance Chaser, The . . . . .	<i>L. G. Smith</i> . . . . . 263
Legal Ditties . . . . .	. . . . . 549
McCarty Won His Case . . . . .	<i>Cornelius B. Palmer</i> . . . . . 432
Qualifications . . . . .	<i>Douglas Malloch</i> . . . . . 569
Question of Law, A . . . . .	<i>E. S.</i> . . . . . 465
Regrets . . . . .	. . . . . 66
Soul of Justice, The . . . . .	<i>J. Jay Potter</i> . . . . . 320
Victim in Evidence, The . . . . .	<i>Henry Burns Geer</i> . . . . . 283
View of the Inquiry Granted to Rear-Admiral Schley. A Legal. <i>See</i> Legal View of the Inquiry Granted to Rear-Admiral Schley . . . . .	. . . . . 99
Voorhees, Daniel W., as Lawyer and Orator (with portrait) . . . . .	<i>W. W. Thornton</i> . . . . . 355
Wager of Battle (illustrated) . . . . .	<i>M. S. Gilpatric</i> . . . . . 321
Waite, Morrison Remick (with portrait) . . . . .	<i>Francis R. Jones</i> . . . . . 257
Was a Good Witness Himself . . . . .	<i>Jonas Jutton</i> . . . . . 533
Was Shakespeare Bound to an Attorney? . . . . .	<i>J. B. Mackenzie</i> . . . . . 58
Witness Himself, Was a Good . . . . .	<i>Jonas Jutton</i> . . . . . 533
Women under Early Christian Law . . . . .	<i>R. Vashon Rogers</i> . . . . . 539
Wool-sack and Woolens in the Reigns of the Earlier Ed- wards, The . . . . .	<i>L. G. Smith</i> . . . . . 595
Word More as to the Coal Mines, A . . . . .	<i>H. W. Chaplin</i> . . . . . 570
Work of Lord Coke, A Posthumous . . . . .	. . . . . 585

## INDEX TO BOOK REVIEWS.

## Law Books Reviewed.

	PAGE
American Bar Association, Report of the Twenty-fourth Annual Meeting of the	256
American State Reports, The. Vols. 80, 81, 82, 83, 84, 85, 86. <i>By</i> A. C. Freeman.	48, 98, 304, 304, 402, 558, 614
Bankruptcy, The Law of. 2d Edition. <i>By</i> Edwin C. Brandenburg	47
Bench and Bar as Makers of the American Republic, The. <i>By</i> W. W. Goodrich	613
Bench and Bar of California, History of the. <i>By</i> Oscar T. Shuck	97
Brief for the Trial of Criminal Cases, A. 2d Edition. <i>By</i> Austin Abbott; W. C. Beecher	613
Brief of the Modes of Proving the Facts Most Frequently in Issue or Collaterally in Question on the Trial of Civil or Criminal Cases, A. 2nd Edition. <i>By</i> Austin Abbott	98
Colorado Bar Association, Report of Special and Regular Meetings of the. Vol. 5	558
Criminal Code and the Law of Criminal Evidence in Canada, The. <i>By</i> W. J. Tremear	614
Criminal Law, Outlines of. <i>By</i> Courtney Stanhope Kenny	558
Criminal Law, Selection of Cases Illustrative of English. <i>By</i> Courtney Stanhope Kenny	96
Cyclopedia of Law and Procedure. Vol. III. <i>By</i> William Mack; Howard P. Nash	304
Digest of the Divorce Laws of the United States, Tabulated. <i>By</i> Hugo Hirsh	48
Diseases Caused by Accident, Atlas and Epitome of. <i>By</i> Ed. Golebiewski; Pearce Bailey	98
Domestic Relations of the State of New York, The Law of. 2d Edition. <i>By</i> Frank B. Gilbert; F. W. Battershall	613
Electrical Cases, American. Vol. VII. <i>By</i> William W. Morrill	256
English Ruling Cases. <i>By</i> Robert Campbell; Irving Browne; Leonard A. Jones. Vol. XXVI. <i>By</i> Edward Manson; John M. Gould	557
Equity, A Manual of the Principles of. 5th Edition. <i>By</i> John Indemaur	255
Federal Practice, A Treatise on. 3d Edition. <i>By</i> Roger Foster	613
Highway Law of the State of New York. 2d Edition. <i>By</i> H. Noyes Greene; L. L. Boyce	402
History and Jurisprudence, Studies in. <i>By</i> James Bryce	255
Income Tax, The Acts Relating to the. 5th Edition. <i>By</i> Stephen Dowell; J. E. Piper	354
Index-Digest of the New York Court of Appeals Decisions, An. <i>By</i> Colin P. Campbell	48
Injunctions and Other Extraordinary Remedies, A Treatise on. 2d Edition. <i>By</i> Thomas Carl Spelling	154
International Public Law, A Treatise on. <i>By</i> Hannis Taylor	352
Juridical Law, Studies in. <i>By</i> Horace E. Smith	506
Law and Practice in Civil Actions and Proceedings in Justices' Courts, and in other Courts not of Record, and on Appeals to the County Courts in the State of New York. 7th Edition. <i>By</i> William Wait; Edwin Baylies	304
Miscellaneous Writings of the late Hon. Joseph P. Bradley. <i>By</i> Charles Bradley	203
Negligence in all Relations, Commentaries on the Law of. Vols. II, III. <i>By</i> Seymour D. Thompson	303
Pleas of the Forest, Select. Selden Society. Vol. XIII. <i>By</i> G. J. Turner	92
Pleas, Starrs, and other Records from the Rolls of the Exchequer of the Jews, Select. Selden Society. <i>By</i> J. M. Rigg	448
Practice Time Table. 2d Edition. <i>By</i> H. Noyes Greene	614
Probate Reports Annotated. Vols. V, VI. <i>By</i> George A. Clement	48, 402
Real Property, Elements of the Law of. <i>By</i> Grant Newell	614
Sales of Personal Property, The Elements of the Law of. <i>By</i> William L. Burdick	506
Selden Society, Publications of the. Select Pleas of the Forest. <i>By</i> G. J. Turner. Select Pleas, Starrs, and other Records of the Exchequer of the Jews. <i>By</i> J. M. Rigg	92, 448
Society of Comparative Legislation, The Journal of the. New Series, No. VIII. <i>By</i> John Macdonell; Edward Manson	204

**Law Books Reviewed — Continued.**

	PAGE
Trusts, Commercial. <i>By</i> John R. Dos Passos . . . . .	96
Trusts and Trustees, A Practical and Concise Manual of the Law Relating to Private. 5th Edition. <i>By</i> Arthur Underhill . . . . .	256
Trusts, The Control of. <i>By</i> John Bates Clark . . . . .	96
United States Reports, Notes on the. Books XII, XIII. <i>By</i> Walter Malins Rose . . . . .	98
United States Steel Corporation, A Study of the. <i>By</i> Horace L. Wilgus . . . . .	96
University of Pennsylvania. Proceedings at the Dedication of the New Building of the Department of Law. <i>By</i> George Erasmus Nitzsche . . . . .	303
Wills, A Manual relating to the Preparation of. 2d Edition. <i>By</i> George F. Tucker . . . . .	204
Woman's Manual of Law, The. <i>By</i> Mary A. Greene . . . . .	614

**Miscellaneous Books Reviewed.**

Barrister, The. <i>By</i> Charles Frederick Stansbury . . . . .	351
Battle with the Slums, The. <i>By</i> Jacob A. Riis . . . . .	612
Conqueror, The. <i>By</i> Gertrude Franklin Atherton . . . . .	505
Crisis, The. <i>By</i> Winston Churchill . . . . .	612
Dorothy Vernon of Haddon Hall. <i>By</i> Charles Major . . . . .	505
First Centennial Anniversary, Celebration and Banquet. "John Marshall Day." <i>By</i> Wil- liam L. January . . . . .	302
Isle of the Shamrock, The. <i>By</i> Clifton Johnson . . . . .	92
Late Returning, The. <i>By</i> Margery Williams . . . . .	505
Lee at Appomattox, and Other Papers. <i>By</i> Charles Francis Adams . . . . .	556
Literary Index, The Annual. <i>By</i> W. I. Fletcher; R. R. Bowker . . . . .	302
New England and its Neighbors. <i>By</i> Clifton Johnson . . . . .	612
Portraits of English Judges . . . . .	612
Recollections of Half a Century. <i>By</i> Alexander K. McClure . . . . .	612
Reminiscences of a Dramatic Critic. <i>By</i> Henry Austin Clapp . . . . .	401
Retrospect and Prospect. <i>By</i> A. T. Mahan . . . . .	557
Salmon and Trout. <i>By</i> Dean Sage; C. H. Townsend; H. M. Smith; W. C. Harris . . . . .	612
Up in Maine. <i>By</i> Holman F. Day . . . . .	153
Upland Game Birds. <i>By</i> Edwin Sandys; T. S. Van Dyke . . . . .	506
Webster, Daniel. <i>By</i> Samuel W. McCall . . . . .	350
Western Civilization. <i>By</i> Benjamin Kidd . . . . .	253



## INDEX TO EDITORIALS.

	PAGE		PAGE
Aldrich's Bill to Protect the President, Judge . . . . .	45	Individual Liberty," "The Judicial His- tory of . . . . .	497
Anarchy, Legislation Against . . . . .	45	Legislation against Anarchy . . . . .	45
Arnold on the Holmes Case, Judge . . . . .	87	Lincoln as a Lawyer . . . . .	250
<i>Brief, The</i> . . . . .	297	Loss of our Jewels, The . . . . .	199
Coal Mines and the Public, The . . . . .	496	Notes of Mr. Justice Washington . . . . .	445
Contributor, An Esteemed . . . . .	200	Proposed Penal Code of the United States Criticised . . . . .	87
Criminal Sentences, Uniformity in . . . . .	199	Renton, A. Wood . . . . .	200
Ellsworth, Oliver . . . . .	249	Schley Inquiry," Mr. Grinnell's "Legal View of the . . . . .	87, 149
Federal Judicature," "A Century of <i>Financée</i> , A . . . . .	497	Thayer, Professor James Bradley . . . . .	149
Getz, Dr. Bernhard . . . . .	88	Uniformity in Criminal Sentences . . . . .	199
Grinnell's "Legal View of the Schley In- quiry," Mr. . . . .	87, 149	Veeder's Two New Series of Articles, Mr. . . . .	497
Holmes Case, Judge Arnold on the . . . . .	87	Washington, Notes of Mr. Justice . . . . .	445

## INDEX TO NOTES.

	PAGE		PAGE
Abolish the Court, Would . . . . .	501	Anecdotes about . . . . .	
Across the Line . . . . .	608	J. P. Curran . . . . .	302
"Ad.," A Kansas Legal . . . . .	200	Mr. Danckwerts . . . . .	505
Adam and Eve . . . . .	46	Senator Daniel . . . . .	446
Adam Swindler . . . . .	398	David Davis . . . . .	347
Affirmed . . . . .	554	J. P. Dolliver . . . . .	91, 397
All in a Name . . . . .	346	Lord Eldon . . . . .	610
Anecdotes about . . . . .		Lord Esher . . . . .	300
Lord Ashbourne . . . . .	502	Richard Eve . . . . .	46
Judge Audenried . . . . .	202	Lord Field . . . . .	502
Mr. Justice Bigham . . . . .	505	W. M. Gifford . . . . .	47
Sir William Blackstone . . . . .	610	Mr. Justice Gray . . . . .	553
Mr. Justice Bradley . . . . .	553	Lord Halsbury . . . . .	447
Benjamin F. Butler . . . . .	92	C. P. Harris . . . . .	501
Sir Theobald Butler . . . . .	400	Lord Herschell . . . . .	556
Matthew H. Carpenter . . . . .	609	William F. Howe . . . . .	609
M'lle. Chauvin . . . . .	150	N. M. Hubbard . . . . .	150, 201, 397
Rufus Choate . . . . .	399, 502, 553	"Fat James" . . . . .	47
Henry Clay . . . . .	503	Lord Jeffreys . . . . .	610
Timothy Coffin . . . . .	150, 447	William Travis Jerome . . . . .	555
Lord Chief Justice Coleridge . . . . .	202	"Uncle Jimmie" Jordan . . . . .	150
Congressman Cousins . . . . .	252	<i>Juvenis</i> . . . . .	47

	PAGE		PAGE
Anecdotes about		Circulation, Retired from	501
Abraham Lincoln	89, 202, 397	Claimed Nothing, The Court	553
Lord Justice Lush	610	Clerk, An Enterprising	504
Montague Lush	505	Code, The New Russian Criminal	253
Lord Mansfield	200	Compliment, His Greatest	609
Michael McCartan	610	Compulsory Education in Iowa	502
Cave J. McFarland	608	Concentration, Lord Herschell's	556
Tom H. Milner	608	Confidence, Self	502
William H. Moody	252	Constitution, An Iron	400
Giuseppe Musolino	400	Continuance upon General Principles, A	553
Henry W. Paine	347	Convicted, Wrongly	504
Henry C. Parsons	347	Cool, Too	400
Charles Phillips	302	Costumes, Illegal	503
Judge Rockwell	553	Court, Carried to a Higher	347
Lord Russell of Killowen	90	Court Claimed Nothing, The	553
J. B. Ryan	501	Court of Brotherhood and Guestling, The	609
Chief Justice Shaw	502	Court Reserved the Right, The	607
Leslie M. Shaw	47, 89, 149	Court," "Squashed the Hull	347
Lord St. Leonards	90	Court was Dry, The	554
Lord Stowell	503	Court, Would Abolish The	501
Judge Thompson	47	Criminal Code, The New Russian	253
Lord Thurlow	398	Criticism? What is Fair	609
James A. Trewin	447	Declaration, A New York	301
H. H. Trimble	201	Deed, A Poetic	151
Adam Walker	46	Defendant's Dream, The	399
Daniel Webster	46	Dignity in the Court-room	252
Noah Webster	91	Dipsomaniac Law, Iowa's	502
Piers White	502	Disagreed, The Jury	251
Montagu Williams	447	Disparaged his Client	302
Answer, A Novel	348	Distinction between an Attorney and a Solicitor	445
<i>Ante Mortem</i> Epitaph, An	47	Divorce, A Double	446
Argument, A Model	150	Divorce Bill, Earl Russell's	348
Asked Postponement	447	Dog-bite, Just a	607
Assault Case, An	202	Dog Case, A French	607
Attorney and a Solicitor, The Distinction between an	445	Domestic Relations	91
Authority, A High	302	Double Sentence, A	200
Authority to Sit Down	300	Dream, The Defendant's	399
Aversion, Lord Herschell's Pet	556	Dreams of Youth, Realized the	200
Bad Sermon, A	555	Drunkenness, A Test of	202
Bailey, Executions before the Old	610	Dry Sponges, Wet and	555
Bald-faced Bull Calf, A	299	Dry, The Court was	554
Baptist, A Hardshell	608	Ear-marks	89
Bar Examination, A	253	Education in Iowa, Compulsory	501
Barrister, A French Lady	150	End, Didn't say Which	397
Barristers and Solicitors, London's	202	Enterprising Clerk, An	504
Beards, Long	503	Epitaph, A Lawyer's	201
Beyond the Jurisdiction	202	Epitaph, An <i>Ante-Mortem</i>	47
Boy was a Girl, The	91	Eve, Adam and	46
Brief, a Western	299	Examination, a Bar	253
Brigand, Trial of Musolino, the Calabrian	400	Excuses, A Juryman's	399
Broke the Game Laws	201	Executions before The Old Bailey	610
Brotherhood and Guestling, The Court of	609	Facial Expression, Henry Clay's	503
Calf, A Bald-faced Bull	299	Fair Criticism? What is	609
Carried the Joke too Far	399	Fearlessness, General Butler's	92
Carried to a Higher Court	347	Fendal v. Logan	301
Chinese Thieves	400	Fool and Physician	503

	PAGE		PAGE
Foresight . . . . .	299	Laws, Broke the Game . . . . .	201
French Dog Case, A . . . . .	607	Lawyer, A Railway . . . . .	397
French Lady Barrister, A . . . . .	150	Lawyer, Was His . . . . .	505
Friday, Good . . . . .	200	Lawyer's Epitaph, A . . . . .	201
Friend in Need, A . . . . .	609	Lazarus Licked by the Dogs, Like . . . . .	150
Game Laws, Broke the . . . . .	201	Legal "Ad.," A Kansas . . . . .	200
General Principles, A Continuance on . . . . .	553	Legal Minstrels . . . . .	252
Georgia Solomon, A . . . . .	91	Lemons, Hand-picked . . . . .	555
Girl, The Boy was a . . . . .	91	Lien, A . . . . .	397, 553
Glib Witness, A . . . . .	445	Likeness, No . . . . .	502
Golden, Silence is . . . . .	502	Line, Across the . . . . .	608
Good Friday . . . . .	200	Logan, Fendal <i>v.</i> . . . .	301
Guernsey, The Judicial System of . . . . .	150	London's Barristers and Solicitors . . . . .	202
Guestling, The Court of Brotherhood and . . . . .	609	Love of Justice, Lincoln's . . . . .	202
Habit, A Pernicious . . . . .	200	Lunatic, Mistaken for a . . . . .	90
Had been There Before . . . . .	401	Magistrate, A Tennessee . . . . .	398
Hand-picked Lemons . . . . .	555	Mandamus . . . . .	300
Hard Luck . . . . .	400	Manx Labor Law, A . . . . .	151
Hardshell Baptist, A . . . . .	608	Memory, Lord Herschell's . . . . .	556
Hat, The Wrong . . . . .	447	Met his Match . . . . .	400
Hen's Time, Saving the . . . . .	555	Minstrels, Legal . . . . .	252
High Authority, A . . . . .	302	Mistaken for a Lunatic . . . . .	90
Higher Court, Carried to a . . . . .	347	Mistaken Identity . . . . .	347, 349
His Lawyer, Was . . . . .	505	Mixed Relationship, A . . . . .	610
Homeliness, Lincoln's . . . . .	89	Model Argument, A . . . . .	150
Horsewhipped by his Client . . . . .	302	Modes of Taking the Oath . . . . .	504
Husband, Thankful for a . . . . .	446	Motion for a New Trial, A . . . . .	609
Identity, Mistaken . . . . .	347, 348	Mummy? What is a . . . . .	151
Ignorance, Judicial . . . . .	200	Name, All in a . . . . .	346
Illegal Costumes . . . . .	503	Name, Robbed of your Good . . . . .	253
Involuntary Witness, An . . . . .	252	Necktie, Where to Wear a . . . . .	47
Iowa, Recent Laws in . . . . .	502	Need, A Friend in . . . . .	609
Irish Will, An . . . . .	201	New Russian Criminal Code, The . . . . .	253
Iron Constitution, An . . . . .	400	New Trial, A Motion for a . . . . .	609
Joke, A Serious . . . . .	251	New York Declaration, A . . . . .	301
Joke too Far, Carried the . . . . .	399	Newgate, Relics of . . . . .	401, 610
Judges as Plaintiffs or Defendants . . . . .	202	Novel Answer, A . . . . .	348
Judicial Ignorance . . . . .	200	Oath, Modes of Taking the . . . . .	504
Judicial System of Guernsey, The . . . . .	150	Oath, Took the . . . . .	554
Jurisdiction, Beyond the . . . . .	202	Old Bailey, Executions before the . . . . .	610
Jury, Didn't Strike the . . . . .	301	"Old Times at the Law School" . . . . .	611
Jury Disagreed, The . . . . .	251	One at a Time . . . . .	608
Jury, Sat on the . . . . .	149	Opinion, A Written . . . . .	554
Juryman's Excuses, A . . . . .	399	Pardon, Governor Shaw's . . . . .	47
Justice . . . . .	397	Purgatory . . . . .	609
Justice, Lincoln's Love of . . . . .	202	Pernicious Habit, A . . . . .	200
Kansas Legal "Ad.," A . . . . .	200	Physician, Fool and . . . . .	503
Kind Words, Wanted a Few . . . . .	150	Poetic Deed, A . . . . .	151
Kindness of Heart, Lincoln's . . . . .	397	Postponement, Asked . . . . .	447
Kiss before the Law, A . . . . .	445	Power of a Title . . . . .	501
Ku Klux Klan, Not a . . . . .	608	Principles, A Continuance on General . . . . .	553
Labor Law, A Manx . . . . .	151	Protected the Trust Estate . . . . .	347
Lady Barrister, A French . . . . .	150	Railway Lawyer, A . . . . .	397.
Land of Noah Webster . . . . .	91	Reading, Rufus Choate's Impressive . . . . .	553
Larceny . . . . .	251	Realized the Dreams of Youth . . . . .	200
Law, A Kiss before the . . . . .	445	Realized the Responsibility . . . . .	401
Law, A Manx Labor . . . . .	151	Relations . . . . .	91

	PAGE		PAGE
Relationship, A Mixed . . . . .	610	Test of Drunkenness, A . . . . .	202
Relics of Newgate . . . . .	401	Thankful for a Husband . . . . .	446
Retired from Circulation . . . . .	501	Thanksgiving Day, A Special . . . . .	89
Robbed of your Good Name . . . . .	253	Thieves, Chinese . . . . .	400
Root's Reports . . . . .	502	Time, Saving the Hen's . . . . .	555
Russian Criminal Code, The New . . . . .	253	Tit for Tat . . . . .	447
Sat on the Jury . . . . .	149	Title, Power of a . . . . .	501
Saving the Hen's Time . . . . .	555	Too Much of a Good Thing . . . . .	252
School," "Old Times at the . . . . .	611	Took the Oath . . . . .	554
Self Confidence . . . . .	502	Travelling Salesman, A . . . . .	607
Sentence, A Double . . . . .	200	Trial, A Speedy . . . . .	300
"Sentence me Fust" . . . . .	608	Trial of Musolino, the Calabrian Brigand . . . . .	400
Serious Joke, A . . . . .	251	Trust Estate, Protected the . . . . .	347
Serjeants' Mottoes . . . . .	610	Two were Stolen . . . . .	91
Sermon, A Bad . . . . .	555	Usury, A System of . . . . .	502
Silence is Golden . . . . .	502	Wanted a Few Kind Words . . . . .	150
Solicitor, The Distinction between an At- torney and a . . . . .	445	Western Brief, A . . . . .	299
Solicitors, London's Barristers and . . . . .	202	Wet and Dry Sponges . . . . .	555
Solomon, A Georgia . . . . .	91	What is a Mummy? . . . . .	151
Special Thanksgiving Day, A . . . . .	89	Which End, Didn't say . . . . .	397
Speedy Trial, A . . . . .	300	Will, An Irish . . . . .	201
Sponges, Wet and Dry . . . . .	555	Wit, Lord Esher's . . . . .	300
"Squashed the Hull Court" . . . . .	347	Witness, A Glib . . . . .	445
Stolen, Two were . . . . .	91	Witness, An Excellent . . . . .	446
Strike the Jury, Didn't . . . . .	301	Witness, An Involuntary . . . . .	252
Stuttering Stories, Judge Thompson's . . . . .	47	Words, Wanted a few Kind . . . . .	150
Swindler, Adam . . . . .	398	Writing, Rufus Choate's . . . . .	399
Sworn at, Not . . . . .	505	Written Opinion, A . . . . .	554
Taking the Oath, Modes of . . . . .	504	Wrong Hat, The . . . . .	447
Tennessee Magistrate, A . . . . .	398	Wrongly Convicted . . . . .	504
		Youth, Realized the Dreams of . . . . .	200

## AUTHORS' INDEX.

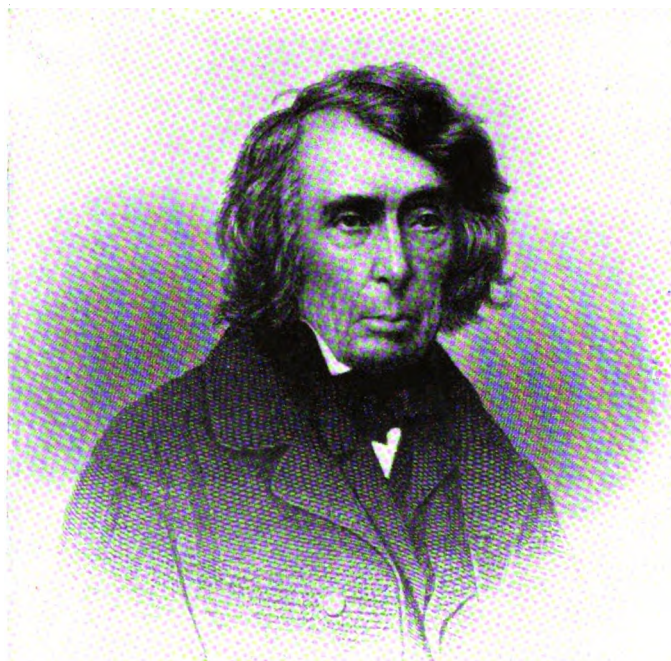
	PAGE		PAGE
AMRAM, BEULAH BRYLAWSKI		FRIEDMAN, LEE M.	
Curious Nullity Suit of the Thirteenth		Black Eagle Case, The . . . . .	63
Century, A . . . . .	383	FROST, E. ALLEN	
AMRAM, DAVID WERNER		<i>Doctrina Placitandi</i> (illustrated) . . .	584
Lawyer's Studies in Biblical Law, A :		GEER, HENRY BURNS	
Family Solidarity . . . . .	490	Fight for Primitive Rights, A . . . .	486
Patriarchal Family, The . . . . .	83	Question of Jurisdiction, A . . . . .	548
Position of Women, The . . . . .	343	Solomon of the Turkey Roost, A . . .	195
Powers of the Patriarch, The . . . .	231	Victim in Evidence, The . . . . .	283
ARNOLD, MICHAEL		GILPATRIC, M. S.	
Analysis of the Holmes Case, An (illus-		Wager of Battle (illustrated) . . . .	321
trated) . . . . .	176	GRINNELL, CHARLES E.	
BARBER, ARTHUR WILLIAM		Legal View of the Inquiry Granted to	
Christianity and the Common Law . .	267	Rear-Admiral Schley and of Other	
BEALE, J. H., Jr.		Inquiries of Military Courts, A (il-	
European Divorces while You Wait . .	9	lustrated) . . . . .	99
BEEDE, VINCENT VAN MARTER		IRWELL, LAWRENCE	
Fleet Marriages . . . . .	234	Extradition . . . . .	314
Landmarks of Chinese Law, I-III.		Humors of the English Jury Box . .	228
. . . . .	466, 534, 578	Judicial System of France, The (illus-	
BREWER, DAVID J.		trated) . . . . .	527
Jury, The . . . . .	67	JOHNSON, ENOCH	
CAMPBELL, ALLAN R.		Kentucky Court Room, A . . . . .	318
Law as Treated in Fiction, The . . .	364	JOHNSON, WILLIAM E.	
CHAPIN, H. GERALD		Glasgow, Queer Laws of Mediæval (il-	
Sainte Croix-de Brinvilliers Case, The		lustrated) . . . . .	416
(illustrated) . . . . .	216	JONES, FRANCIS R.	
Sequence in Crime, A (illustrated) . .	36	Chase, Salmon Portland (with portrait)	155
Strange Case of Dr. Cream, The . . .	426	Gray, Horace (with portrait) . . . .	403
CHAPLIN, H. W.		Taney, Roger Brooke (with portrait) .	1
Word More as to the Coal Mines, A . .	570	Waite, Morrison Remick (with portrait)	257
CHITTENDEN, GRANVILLE I.		JURY, JOHN G.	
"In the Matter of Rest" . . . . .	336	Lynch Law in California . . . . .	291
CHOATE, JOSEPH H.		JUTTON, JONAS	
Lincoln, Abraham . . . . .	77	Could Show it if Necessary . . . . .	335
DE MORGAN, JOHN		Was a Good Witness Himself . . . .	533
Black Maria, The . . . . .	183	KERR, M. E. E.	
Juries and their Verdicts . . . . .	395	Animals in Court . . . . .	264
Lawyer's Patron Saint, The . . . . .	443	Early English Procedure . . . . .	592
Poison Drama at the Court of Louis		Ghosts in Court . . . . .	172
XIV., The (illustrated) . . . . .	276	LAWRENCE, E. C.	
Strange Experience, A . . . . .	76	Development of Trial by Jury . . . .	239
DIDIER, EUGENE L.		MACKENZIE, J. B.	
Burr, Aaron, as a Lawyer (with portrait)	451	Ancient Reflected through Modern	
E. M.		(verse) . . . . .	519
Bowen, Lord . . . . .	488	Sherlock Holmes' Plots and Strategy .	407
E. S.		Was Shakespeare Bound to an Attor-	
Question of Law, A (verse) . . . . .	465	ney? . . . . .	58

	PAGE		PAGE
MACRAY, E. L.		ROCKWELL, J. H.	
Jury System in Porto Rico, The . . .	420	Kidnapping of the President, The . .	214
MALLOCH, DOUGLAS		ROGERS, R. VASHON	
Gentlemen of the Jury . . . . .	16	Pigs (illustrated) . . . . .	374
Qualifications (verse) . . . . .	569	Women under Early Christian Law .	539
MANSON, EDWARD		SHAUCK, JOHN A.	
Library of the Middle Temple, The		Chief Justice Taney (with portrait) .	559
(illustrated) . . . . .	475	SIBBALD, ANDREW T.	
MARSHALL, MARIA NEWTON		Chinese Police . . . . .	284
Marshall Memorial Tablet, The . .	372	Indian Jails . . . . .	437
MCCLEAN, WM. ARCHIBALD		Reminiscences of the Mafassal Law	
Grave Problem, A . . . . .	586	Courts of Bengal . . . . .	337
Market Value of Speech, The . . .	369	SLOAN, CHARLES W.	
MENDELS, SOLOMON		Green, James S. (with portrait) . . .	205
Constitution and Religion, The . . .	411	SMITH, L. G.	
Some Peculiar Laws . . . . .	576	Evolution of the Ambulance Chaser,	
MILLER, JOHN		The (verse) . . . . .	263
English Prison Rules and Remission of		Quaint Early English Soap Laws . .	368
Sentences for Good Conduct . . .	605	Wool-sack and Woolens in the Reigns	
MONTGOMERY, HARRY EARL		of the Earlier Edwards, The . . .	595
Control of "Trusts," The . . . . .	460	SPERANZA, GINO CARLO	
MOORHEAD, F. G.		Proposed Penal Code of the United	
Varga, Francis (illustrated) . . . .	434	States, The . . . . .	12
MOSES, ADOLPH		STUFF GOWN	
Question of Disputed Guardianship, A .	598	London Legal Letter . . . . .	
MOWRY, DUANE		197, 246, 294, 494, 550	
Arnold, Jonathan E.: A Great <i>Nisi</i>		SULLIVAN, JOSEPH M.	
<i>Prius</i> Lawyer of the West (with		Judicial Oaths in Ancient Ireland . .	85
portrait) . . . . .	305	Legal Study of St. Patrick, A . . .	265
Cary, John W.: A Great Corporation		Trial of Lady Alice Kettle, The . .	433
Lawyer (with portrait) . . . . .	507	TERRELL, J. C.	
Public Reform and Municipal Govern-		Lynch Law in Texas in the Sixties . .	382
ment . . . . .	209	THORNTON, W. W.	
NORRIS, W. F.		Harrison, Benjamin, as a Lawyer and	
Legal Conditions in Island of Negros .	19	an Orator (with portrait) . . . .	49
ODLIN, ARTHUR F.		Voorhees, Daniel W., as Lawyer and	
Philippine Decision, A . . . . .	274	Orator (with portrait) . . . . .	355
ORMSBY, GEORGE F.		TRAVOUS, CHARLES N.	
American Bastille, The . . . . .	520	Legal Status of the Mother-in-Law,	
PALMER, CORNELIUS B.		The . . . . .	25
Counsellor McCann (verse) . . . .	175	VEEDER, VAN VECHTEN	
McCarty Won his Case (verse) . . .	432	Century of English Judicature, A, XI,	
PECKHAM, WILLIAM G.		XII (illustrated) . . . . .	27, 71
Great Lawyers, and How they Won .	173	WESTLEY, GEORGE H.	
POTTER, I. JAY		How Torture was Abolished in France	35
Soul of Justice, The (verse) . . . .	320	Privileges of the Peers . . . . .	341
ROBERTSON, MAX A.		WYMAN, BRUCE	
Cases from the Old English Law Re-		Coal Mines and the Law, The . . .	514
ports:		Russell, Charles, Barrister (illustrated)	166
III. Contracts Impossible of Per-			
formance . . . . .	184		









*B. B. Torrey*

# The Green Bag.

VOL. XIV. No. I.

BOSTON.

JANUARY, 1902.

## ROGER BROOKE TANEY.

BY FRANCIS R. JONES.

I N 1836 the Supreme Court of the United States had passed the empirical stage of its history. It had become a mighty power. Its authority was paramount. Its decisions were regarded with confidence and veneration by both the profession and the public. This happy establishment of the court as a potent, co-ordinant branch of the national government was largely due to the characters and abilities of all the great men and learned lawyers who had sat upon its bench. But it was due principally, of course, to the great Chief Justice, John Marshall. At his death the supremacy of the Constitution and the laws of the United States was beyond cavil. The fundamental principles of constitutional construction were laid upon bases so firm and broad that they could not be shaken. The strength of the national government not only had been established, but it had been demonstrated. The ability of the States to deal with all questions of local government in harmony with one another and with the national government had been proved. Under the guiding hand of the great expositions of its fundamental law made by the Supreme Court, the nation had risen from early weakness and tentative faltering to a consciousness of its power. The country had passed its infancy. It was fast growing into a stalwart manhood. The generation that assisted at its birth had passed away. New questions had arisen. New men, with different ideals and with different purposes, guided its policy. The country had expanded from a strip of sea-coast to a continent. It had waged one war

for the freedom of the sea, and was about to wage another for territorial aggrandizement. The necessity for a strong central government, which had been the controlling idea and purpose of many of the fathers of the Republic, like Washington, Jay, Hamilton, Adams and Marshall, was not felt by men who had not witnessed the impotency of the Confederation, or, if felt, was known to have been attained. The theory of States Rights was beginning to be elaborated and insisted upon. The marvellous advance in industries served to emphasize the apparent, but superficial, antagonism of interests between the North and the South. And it so happened that just at that time the country had come to the parting of the ways in its history. The influence of events could not be otherwise than felt by all its citizens. The course of politics had become disturbed and embittered. The grave question of slavery would not down, and was constantly growing more insistent and passionate. The political tendencies which resulted in the war with Mexico were just beginning to be manifested. There still reverberated the echoes of Andrew Jackson's troublous administrations, not yet ended. The country had grown and prospered. Internal improvements were necessary. They could hardly have been carried out by the national government on a sufficiently extensive and expeditious scale to be adequate to the necessities.

In these circumstances and under these conditions it was not surprising, nay, perhaps it was inevitable, that there should have

been a change in the tendency of judicial decisions. After the transcendent supremacy of Marshall, whose commanding genius for thirty-four years had dominated the deliberations of the Supreme Court, it was natural that there should come a period of reaction. The loss of his leadership was great, but perchance the change was salutary. In this situation of public affairs it was fortunate for the country and for the cause of jurisprudence that so great a technical lawyer and so estimable a man as Taney should have been called to the Chief Justiceship of the United States. His character was firm and pure beyond reproach. His legal learning was far greater than that of any of his predecessors. His independence of character and absolute integrity, both mental and moral, were equal to those of any. Greater praise than this would be impossible. It would have been too much to expect that the successor of Marshall would have the same paramount influence over his associates upon the bench. For thirty-four years the court had been benignly ruled by one mind and one personality, which the other judges looked up to and worshipped. There had been but few divisions of opinion in its councils. Upon the advent of Taney new men became associated with some of the old, new men with the new ideas of their times. We come to a period of frequent and widespread differences of opinion. The new wine went not well into the old bottles. Moreover, Taney, with all his patient courtesy, with all his strength of character and mind, with all his great technical learning, with all his high ideals of the judicial function and the dignity of his court, with all the personal respect and affection which he inspired and won from his associates, had not the greatness and breadth of mind, the commanding intellect of Marshall. His chronic ill health and great physical weakness must have impaired and lessened his influence by a large measure. Yet his share in the deliberations of the court was greater than is apparent in the reports of its decisions, for his condition

forced him to assign to others the writing of opinions. To his weakness also is due the absence from his own opinions of any array of citations, although his industry was untiring. His importance was greatest at conference, where, as Mr. Justice Curtis said, his dignity, his love of order, his gentleness, his caution, his accuracy and his extraordinary memory were of incalculable value.

There can be no doubt that Taney's temper was quick and violent. He restrained it, however, with an iron will. Under provocation its only indications were a kindling eye and burning cheek, and a voice that spoke low the fewest of words. His ideals were lofty, and, in spite of a morbid sensitiveness that felt to the quick any disparagement or criticism, he ever strove to achieve them in the midst of constant physical difficulty. Mr. Justice Curtis, at the meeting of the bar of the First Circuit on October 15, 1864, well described him as he appeared in 1851: "His tall, thin form, not much bent with the weight of years, but exhibiting in his carriage and motions great muscular weakness, the apparent feebleness of his vital powers, the constant and rigid care necessary to guard what little health he had, strongly impressed casual observers with the belief that the remainder of his days must be short. But a more intimate acquaintance soon produced the conviction that his was no ordinary case, because he was no ordinary man. An accurate knowledge of his own physical condition and its necessities; an unyielding will, which while it conformed everything to those necessities, braced and vivified the springs of life; a temper which long discipline had made calm and cheerful." He guarded himself with a scrupulous care from any deviation from the narrow path which he had prescribed for himself. While Secretary of the Treasury he refused to receive as a gift a box of cigars sent to him by a deputy collector. While Chief Justice he declined to allow Seward to dedicate to him a speech on the subject of the indemnity for French spoliation, saying: "Ever since I have been

on the bench I have felt very unwilling to have my name in any way connected with a measure pending before the legislative or executive departments of the government; and have studiously abstained from doing anything that might be construed into interference on my part. I have adopted this course from the belief that it would enable me to discharge my judicial duties more usefully to the public." He never arrogated anything to himself, and his humility was as striking as it was sincere. Born and bred a Roman Catholic, with characteristic loyalty and faith, he was ever a devout but unobtrusive worshipper in that communion. I venture to think that it would be impossible to give a better conception of the singular personal charm and dignity of this quiet, taciturn, deep thinking and deep feeling man, than by quoting here a letter which he wrote to his wife on January 7, 1852: "I cannot, my dearest wife, suffer the seventh of January to pass without renewing to you the pledges of love which I made to you on the seventh of January forty-six years ago. And although I am sensible that in that long period I have done many things that I ought not to have done, and have left undone many things that I ought to have done, yet in constant affection to you I have never wavered—never being insensible how much I owe to you—and now pledge to you again a love as true and sincere as that I offered on the seventh of January, 1806."

The early life of most lawyers is devoid of general interest. Taney's was no exception to the rule. The bald statement of facts and dates is laboriously crude, but will be here set down as succinctly as may be. There were no great public events in his early manhood which could bring out his strength or place him in a prominent position or give color to his life. The heroic age of the Republic was passed. His professional beginnings were small and unimportant. His rise to the leadership of the bar of Maryland seems to have been steady and consistent. His political campaigns for the

State Legislature do not appear to have interrupted his professional work or added to his reputation. In reality, until his entrance into Jackson's cabinet, he was only a private citizen, unknown except in his own State.

Roger Brooke Taney was born on March 17, 1777, in the county of Calvert and State of Maryland. His father owned a large plantation on the banks of the Patuxent River. His earliest instruction was by an ignorant old man, who kept a school in a log-cabin about three miles from his home, whither, from want of a better, he was sent. After three years of this tuition he went to the grammar school of the county, where he began the study of Latin. In a few months, however, the teacher became insane, and the young scholar returned home to be prepared for college by a tutor. At the age of fifteen he entered Dickinson College at Carlisle, Pennsylvania. There he seems to have enjoyed the life of the small institution, and was elected the valedictorian of his class. Upon his graduation, in the fall of 1795, he returned home to spend the winter in the joyous pursuit of hunting and the pleasant reveries created by unlimited egg-nog. The attractive picture which he gives in his autobiography of this period of his life shows the strong impression which it made upon him. He speaks of the hard riding in the frosty mornings, the gay conversation around the fires in the afternoons and evenings, with the discussions of the mishaps of the day and the arrangements for the morrow, the playing of cards and the drinking. But he is careful to add that there was no drunkenness and no gambling. It was altogether an ideal life, idle, but none the less invigorating. He says of it: "It was intended, I presume, to give me a season of relaxation and amusement before I entered on the study of the law; and I liked it and enjoyed it greatly. For although my health was not robust and egg-nog was very apt to give me a headache, yet, in the excitement of the morning, I forgot the fatigue of the preceding day, and

rode as hard as anybody and followed the hounds with as much eagerness. By the end of the winter I was a confirmed fox hunter." But in the spring of 1796 he was tired of the idleness, and impatient to begin the study of the law, which profession he preferred. He then entered the office, at Annapolis, of J. T. Chase, at that time one of the judges of the General Court of Maryland. There he applied himself with great industry for three years, and in the spring of 1799 was admitted to the bar. He says that for weeks together he read law for twelve hours out of every twenty-four, and went very little into society, an omission which he deprecates. It was the golden age of the Maryland bar, with Luther Martin at its head. The great lawyers, whom the young student saw and heard, stimulated his ambition, and he made every possible effort to prepare himself to be their worthy associate or opponent. His keen and analytical mind was particularly adapted to master the forms of practice that were at that time prevalent in Maryland, such as special pleading and the peculiar form of writs of entry. His rise at the bar, however, was somewhat retarded by his father's wish to have him settle in Calvert. There at the age of twenty-two he was elected to the General Assembly as a Federalist. He failed, however, of re-election in 1800, and in 1801 moved to Frederick, where he entered in earnest upon the practice of his profession. In 1803 he was again a candidate for the Maryland Legislature, and again was defeated. In 1806 he married Miss Key, a sister of the author of "The Star Spangled Banner." The next few years of his life were without incident, and apparently the first notable cause in which he was engaged was in 1811, as counsel for Gen. Wilkinson, commander in chief of the army, who was tried by a court-martial for being an accomplice of Aaron Burr. Mr. Taney was successful in the conduct of the defence and refused any compensation for his services. During the war of 1812 he was nominated by the Federalists for a seat in Congress, and was

defeated at the polls, but in 1816 he was elected to the State Senate. These political experiences do not seem to have had any influence, beneficial or otherwise, upon his development or training. But in the spring of 1819 there came an opportunity which he embraced with enthusiasm. He then successfully defended one Gruber, a minister of the Methodist church, who had been indicted upon the charge of inciting servile insurrection. In view of Taney's later conduct in the Dred Scott case it seems important to quote a few sentences from his argument to the jury: "There is no law which forbids us to speak of slavery as we think of it. Any man has a right to publish his opinions on that subject whenever he pleases. It is a subject of national concern, and may at all times be freely discussed. . . . He did rebuke those masters, who, in the exercise of power, are deaf to the calls of humanity. . . . He did speak with abhorrence of those reptiles who live by trading in human flesh and enrich themselves by tearing the husband from the wife, the infant from the bosom of the mother. . . . A hard necessity, indeed, compels us to endure the evil of slavery for a time. It was imposed upon us by another nation, while we were yet in a state of colonial vassalage. Yet, while it continues, it is a blot upon our national character; and every real lover of freedom confidently hopes that it will be effectually, though it must be gradually, wiped away, and earnestly looks for the means by which this necessary object may be best attained."

During these years Taney was retained more and more as the junior of one or the other of the great leaders of the bar, such as Martin, Harper and Pinkney. Upon the death of the latter in 1823, the future Chief Justice moved from Frederick to Baltimore, where he at once became the acknowledged leader. At this time also he changed not only his residence but his politics. The Federal party, ever since its initial opposition to the war of 1812, had been more and more

disintegrating. The Hartford convention had brought the party and its leaders into disgrace. Mr. Taney had vigorously supported the prosecution of the war, although he had antagonized its inception. He could, therefore, have no sympathy with those who had used every exertion in their power to destroy the credit and cripple the resources of the general government. So he joined the party which supported Andrew Jackson, although he had no political aspirations and was more than content with his professional supremacy. In 1827, upon the unanimous recommendation of the Baltimore bar, he was appointed Attorney General of Maryland by Governor Kent, who was a warm supporter of the administration of John Quincy Adams. He was not long suffered, however, to enjoy the repose of his professional labors, but was forced into the arena of national politics. On March 4, 1829, Andrew Jackson was inaugurated President. With the many changes in his cabinet came the exigency which induced him in June, 1831, to call for Taney to become Attorney General of the United States.

Nothing but a stern sense of duty could have induced a man of Taney's temperament to enter the field of national politics, which at that time were peculiarly embittered and partisan, and under the imperious sway of Jackson offered little hope to any man's ambition, and to Taney must have presented great terrors. If he had any forebodings in accepting the office, the next three years fully justified them. His name and character were seized upon by his political enemies and marked out for every species of political calumny and personal abuse. The issues of that day are long since dead, and I have no desire or intention of entering upon them here. Suffice it to say that Mr. Taney had long been convinced that the Bank of the United States was unsound and not a fit depository for the funds of the national government. While Attorney General he repeatedly urged the President to remove the deposits. When, therefore, in the fall

of 1833 Jackson finally concluded to adopt Taney's advice, and Mr. Duane, the Secretary of the Treasury, refused to take the step, the President appointed Taney Secretary of the Treasury in Duane's place. The new secretary carried out forthwith the policy determined upon. That this policy was wise the event showed beyond a doubt. The bank proved to be hopelessly involved and insolvent. Its managers had been speculating and misappropriating its funds, and only escaped criminal prosecution through political influence. The President did not send Mr. Taney's nomination as Secretary of the Treasury to the Senate until June 23, 1834. The nomination was rejected on the following day. On June 25 Mr. Taney resigned his commission and retired to Baltimore to resume the practice of the law. The President in accepting his resignation said: "I cannot refrain from expressing on this occasion my profound regret at the necessity for your retirement from that important office; nor can I suffer the opportunity to pass without paying a just tribute to the patriotism, firmness and ability which you have uniformly exhibited since your introduction into my cabinet."

Mr. Taney was received with much enthusiasm on his return to Maryland, where public dinners and receptions were tendered to him and resolutions approving his course were passed. In his speech at Frederick on one of these occasions he said: "It was impossible in a crisis, when the dearest interests of the country were at stake, that I would, without just disgrace, have refused to render my best services in its defence. . . . The measures which I adopted as Secretary of the Treasury are now before the public, and I am ready to abide the judgment which the American people shall pass upon them. They have indeed brought upon me, it seems, a deep and enduring spirit of hostility. I have been singled out from among the number, who advised and who approved of the measure I pursued, as a fit object to

receive a peculiar mark of indignity. The most unsparing efforts have been made to impeach the integrity of my motives." He knew that his course would cost him dear. But perhaps even he could not have anticipated the scurrility and venom of the attacks which were actually made upon him, not only by newspapers and obscure politicians, but by great men like Clay and Webster. These latter pursued their abuse and hostility, even to doing their utmost to defeat him when nominated to places upon the Supreme Court. But it is a remarkable tribute to Taney's character and ability that he lived to enjoy the felicity of a personal apology from Clay, and of an intimate official relationship with Webster, who constantly sought the advice of the Chief Justice on matters of state.

Mr. Justice Duvall, before whom, when judge of the Mayor's Court of Frederick, Mr. Taney tried his first case, was anxious to resign his seat upon the bench. He was afraid, however, lest Jackson, whose politics he hated, would nominate in his place a bitter partisan. Having discovered that the President would send Mr. Taney's name to the Senate for the first vacant place in the Supreme Court, he resigned in January, 1835. Jackson immediately nominated Taney, and Mr. Chief Justice Marshall interested himself to procure a confirmation of the nomination. This fact alone is sufficient and striking testimony of Taney's fitness for the place. The majority of the Senate were at that time so uncompromisingly hostile to Jackson and Taney that it was inevitable that the nomination should be rejected, and at the last moment of the session its consideration was indefinitely postponed. Mr. Chief Justice Marshall, however, died in the summer of 1835, and on the twenty-eighth day of December the President nominated Mr. Taney to the Chief Justiceship and Judge Barbour to the vacant place of Associate Justice. Taney's nomination was confirmed on March 15, 1836. He first took his seat on the bench in the Circuit Court for the district of Maryland, at Baltimore, in April,

and it was not until the following January term of the Supreme Court that he sat upon the Supreme Court bench. From that time until his death, on October 12, 1864, he performed the high functions of his office with an ability and a gracious dignity that have seldom been equalled. His great veneration for the law and his high ideals of the judicial attributes and bearing, his great learning, his patience and his painstaking accuracy made him in many ways a great judge. Following as he did after so perfect a magistrate as Marshall it would be impossible for him or any man not to be injured by the inevitable comparison. With the exception, however, of Marshall, there can be no doubt that Taney was the greatest Chief Justice of the United States, as he was one of the greatest magistrates in the history of English-speaking peoples. The twenty-eight years of his administration were not marked by such an uniform development as were the thirty-four years of the court under Marshall. That this was due primarily to the fact of the change in the times and ideas, and not to any inherent weakness in the Chief Justice, I have already tried to indicate. But I fear that this is all that can be said with truth. There looms one blot upon his career that cannot be erased, and almost obscures a multitude of virtues.

It would be a task of supererogation to enter here upon an extended notice or criticism of Mr. Chief Justice Taney's opinions. I wish briefly to call attention only to four phases of his judicial career which seem to me to have been of the greatest value to jurisprudence and the greatest monument to his fame. When he came to the court the rules of practice were in a strangely amorphous state. It is one of his glories that he straightened, systemized and settled them upon a basis from which all subsequent rules have arisen. This was no small work, and to him is due no small praise. His training and the peculiar quality of his mind pre-eminently qualified him for the successful accomplishment of this task.

The law with regard to the citizenship of

corporations was in 1836 in a singularly unsatisfactory and transitory state of development. Many cases involving this question came before the Supreme Court during Taney's administration. By a steady progression he finally reached, in *Ohio and Mississippi Railroad Company v. Wheeler*, 1 Black 286, the decision that a suit by or against a corporation must be conclusively presumed to be a suit by or against the citizens of the State which created it.

The greatest work of Taney, however, seems to me to be in those cases of constitutional law in which he guarded the rights and powers of the States. It was due to him more than to any other man that the power of the States to make internal improvements was retained at a time when it was peculiarly necessary that they should have full liberty, unrestrained by any constitutional limitations, to sweep away excrescences and obsolete institutions and build anew works adequate to the times and to the future. This power the Chief Justice preserved in one of his very first opinions in *Charles River Bridge v. Warren Bridge*, 11 Peters 420, where he laid down the doctrine that a State in granting a franchise could not be presumed to have made also an implied contract, which in effect would guarantee the value of the franchise.

No mention of Taney's judicial career could be made that did not include a reference to his opinion in the case of the *Genesee Chief v. Fitzhugh*, 12 How. 443. That judgment extended the maritime and admiralty jurisdiction of the United States over the great lakes and rivers, and established the doctrine upon a firm foundation of reason and unanswerable logic. It has probably had as beneficent an influence over the growth of the country as any legal doctrine that has ever been propounded. This opinion of the Chief Justice is second only to his masterly judgment in the *Charles River Bridge* case. Upon these two cases his reputation as a great judge may rest secure.

At the extremity of his judicial career is

his judgment in *ex parte Merryman*, Campbell 246, in 1861 on the circuit, where he held that the President had no right to suspend the writ of *habeas corpus*. This case on the circuit irresistibly recalls to memory that other judgment in *ex parte Bollman and Swartwout*, 4 Cranch, 75, of his great predecessor. *Ex parte Merryman* was the last case in which the voice of the Chief Justice was heard from the judgment seat. The occasion, however, for protest against the unconstitutional usurpation of power by other branches of the national government was not over. The bitter necessities of civil war dwarfed and buried all other considerations, both constitutional and political. In a letter to Mr. Chase, the Secretary of the Treasury, dated February 16, 1863, as the head of the judiciary he called the Secretary's attention to the unconstitutional construction of the clause of the act of Congress which imposed a tax of three *per cent.* on the salaries of Federal officers, so that it was applied to the salaries of the judges. The Secretary treated the letter with silent contempt.

Mr. Chief Justice Taney is an interesting problem in human character. To me that problem is unsolvable. It is not a pleasant thing to criticise a great magistrate for unjudicial conduct, but I have seen no explanation, and can conceive of none, which satisfactorily explains his attitude and conduct in the *Dred Scott* case. The legal status of slavery, which was the main issue on the merits of that celebrated action of tort, is an obsolete question, and can never be of legal importance again or of more than historical interest. I shall not, therefore, enter here upon any criticism of it, but would refer the curious to the case itself in 19 Howard, 393, and to the joint article upon it by Mr. Justice Gray and the late Judge Lowell in 20 Law Reporter, 61, written in 1857, when they were at the bar. In both will be found full discussions of the right of the United States to acquire territory by treaty or conquest, and to govern it: a discussion of peculiar and controlling interest



at this time. Yet to pass over that case in silence would be to leave any presentation of Taney's life and character pre-eminently incomplete. Consider the situation. Ever since his admission to the bar he had held the highest conception of his profession as a lawyer, of the cause of justice and of the judicial dignity and function. At the bar he had been the fearless advocate of unpopular causes, the conduct of which he had assumed from a sense of duty and, in some cases, without the hope of financial reward. In the political arena he had uncompromisingly performed what he conceived to be his duty in the face of great obloquy. For the twenty years that he had been upon the bench he had upheld the high dignity of the august tribunal over which he presided, and had most carefully kept the court within the strictest judicial limits. He had ever guarded himself with a jealous eye and mind from passing beyond the well defined barriers of judicial conduct. His personal purity, independence and integrity cannot be questioned. He was not a slaveholder. And yet at the age of eighty, when his intellect was as clear as ever, his reasoning faculties as acute as ever, he committed what seems to be a blunder worse than a crime, and demonstrable as such. He threw to the winds the fundamental tenet, to which he had ever held with tenacity, that the opinion of the court should deal only with those points of law which are necessary to the disposal of the case before it, and in a lengthy dictum, characterized by great subtlety of reasoning and misstatements of history, he propounded the most astonishing doctrines of constitutional powers and construction, which were not and are not and never can be law. That he himself had some qualms in regard to his opinion is shown by the fact that under date of September, 1858, he wrote an elaborate memorandum, extending over thirty closely printed octavo pages, in which he tried to bolster up the opinion which he had filed in the case.

The ordinary explanation that is given for this extraordinary aberration does not seem to me to be adequate. If, from his patriotism, he had come to believe that by using the great authority of the Supreme Court and the veneration in which it was held by the public, he could save his country from the impending crisis of civil war and settle the slavery question, he would never have held the plea in abatement good. For, in the first place, there is at least grave doubt whether that plea was before the court. And in the second place so great a technical lawyer as Mr. Justice Curtis thought the plea bad. Apparently a majority of the members of the court thought it either bad or not open to judgment on the record. The Chief Justice would never have made his attempt to settle the slavery question into a dictum, when it was more than possible to have made it the direct and binding judgment of the court.

There is extant a curious pamphlet of some sixty-eight duodecimo pages, printed in New York in 1865, entitled "The Unjust Judge." In it the anonymous author charges Mr. Chief Justice Taney with being faithless as a man, a Christian and a jurist, speaks of him as a reptile and likens him to Pontius Pilate and Lord Jeffreys, of infamous memory. Its tenor shows the fierce passions that were engendered by slavery, and the mighty horror in which the opinion of the Chief Justice in the case of *Dred Scott v. Sandford* was held by many. To them there could be nothing good or pure or righteous in the man who had perpetrated that fatal error. Indeed, even to-day the name of Taney is clouded and his fair fame tarnished by that blunder. He, who had outlived great political calumny to see his bitterest detractors and maligners personally apologize for their words and hostility, died more than blamed by one-half of the country which he had so long, so faithfully and so ably served. It is a tragedy almost as pathetic as *Œdipus Tyrannus*.

**EUROPEAN DIVORCES WHILE YOU WAIT.**

By. J. H. BEALE, JR.

WE are prone to think of our country in the superlative degree. In most particulars we believe ourselves to be among the greatest and best on earth; but if we cannot bring ourselves to this opinion, then we are sure we are the worst. In respect to our civil service, our municipal government, our faith in high ideals, we are dreadfully shocked with ourselves; but chiefly we deplore the laxity of our divorce law. We look with admiration toward the Roman Catholic states of Europe where divorce is unknown, and toward England, which will recognize no divorces but her own. An examination of the records, however, affords us the comfort of discovering other sinners besides ourselves. Demand creates supply in the social as in the business world; and as long as the tenth commandment is broken by men who covet their neighbors' wives the divorce mills will not be confined within the western portion of the Louisiana purchase. The same social necessity which puts Boston alongside no-license Cambridge, to supply her with alcoholic refreshment, gives Austria its Hungary, France its Switzerland and North Germany, and England its Scotland, for the relaxation of galling marital ties.

The man who, in the desire for his neighbor's wife, sets the divorce mill in operation does, it is true, run a risk of injury, in Europe as well as in this country; he must act with circumspection and under competent advice if he would escape a prosecution for adultery. The Supreme Court of Austria and the French Court of Cassation are as alert as the House of Lords or the Supreme Court of the United States to make affairs unpleasant for parties to a fraudulent divorce; as the historiettes which follow will show.

An Austrian gentlemen whom (following the Reporter) we will call B., married a wife; but the venture not proving profitable, their

partnership was dissolved by a judicial separation. The wife, Marie, had, in fact, become enamored of another gentleman, and he of her; and they rightly regarded their case as one calling for the service of counsel learned in the law. "There are two obstacles," said the learned man, "in the way of your becoming happy; you are both Catholics and both Austrians. Your church and your state both forbid divorce. Are you quite sure, though, you are Catholic?" Marie B. confessed that she felt stirring within her doubts of certain Catholic doctrines, and was leaning towards the Unitarian faith; while Herr W. was sure that there was a great deal in the Protestant denial of Papal authority, and on the whole, believed himself a Lutheran. If that were so, all might be easily arranged. In the furthest corner of Hungary, easily accessible by rail, is a very sensible place called Transylvania; and the chief city, Klausenburg, boasts a Unitarian bishop and a Lutheran one, each with his ecclesiastical court prepared to grant divorces to Hungarians of his creed. "Take the Orient Express with a first-class ticket for Klausenburg, be received into the churches to which you respectively lean; get adopted by respectable Hungarian burghers, and thus become Hungarian subjects; and your difficulties will disappear."

No sooner said than done. On the 28th of September, 1891, Marie arrived in Klausenburg (locally and euphoniously called Kolosvar) and at once abjured the Catholic religion, and was received into the Unitarian church; and a month later she was legally adopted by one Joseph F., thereby becoming Hungarian. On the 19th of November the lower ecclesiastical court of the Unitarian Church granted her a divorce from B., and, to make all sure, the Superior Court af-

firmed this decree on the 27th of November. Meanwhile, W. found a good Hungarian, Alexander S., who adopted him on November 9. The lovers both being Hungarians, and Marie divorced, they were married, on the 29th of November, in the Lutheran church. That church was chosen, both because the Unitarian priest was ignorant of German, and also because Marie had already tired of her new faith and had become a Lutheran.

B., the deserted husband, declined to acquiesce in this sensible arrangement. Accordingly, upon the return of the W. family to Prague, he instituted criminal proceedings against them. This was in May, 1892; but though the case went regularly forward, the Austrian courts could not keep the pace set by the courts of Klausenburg. In April, 1894, nothing definite having happened, the implacable B. left for a tour of Hungary. Alas, for the evil power of bad example! On April 9 he reached Buda-Pesth where he abjured Catholicism and embraced the Unitarian faith; on July 28 he became a few days he, too, was divorced from Hungarian; and (*facilis descensus*) within a Marie, with leave to marry again. He at once "declared that he had no legal cause of complaint against Marie and recognized the validity of the second marriage." But this complaisance was too late. The Austrian courts were slow, but exceeding sure. In spite of B.'s defection they declared Marie's marriage invalid.

This diverting tale of high life may be matched by another of even higher life. Henriette-Valentine de Riquet, Countess of Caraman-Chimay, of the high noblesse of Belgium, became the wealthy bride of a foreign prince, Prince de Bauffremont of Paris. But this marriage, strange to relate, proving unhappy, the parties were declared judicially separated. The princess appears to have been a collector of nationalities. Having tried two, she now (perhaps under competent legal advice) yearned to be subject to the Duke of Saxe-Altenburg. She hastened

to the Duke's domains, and was naturalized there; and was no doubt surprised to find, upon consulting her Saxe-Altenburgian counsel, that in that enlightened country a judicial separation granted in a Roman Catholic country is deemed as good as a divorce. And why not? Such countries do not grant divorces. The parties to the separation have done their best to get a divorce, and angels could no more. On this equitable principle the law of her adopted country regarded the Princess de Riquet de Caraman-Chimay de Bauffremont as no longer wedded. The clinging vine had been ruthlessly torn from its supporting oak; and it is the nature of vines under such circumstances—even of vines belonging to the high noblesse—to cling to another oak. Henriette-Valentine added to her collection of oaks, princes and nationalities by wedding the Prince de Bibesco of Roumania. Perhaps she again consulted counsel before her second marriage; be that as it may, Roumania is an enlightened land, where spouses may divorce themselves by mutual consent.

But Madame de Riquet de Caraman-Chimay de Bauffremont de Saxe-Altenburg de Bibesco did not remain in peace. Her delicate sensibilities were shocked to learn that the validity of her second marriage was disputed, and she ran down to Paris to find out about it. The Prince de Bauffremont appealed to the Courts to declare her second marriage null; and the Tribunal of the Seine, the Court of Paris and the Court of Cassation successively so declared. She could not, they held, thus withdraw from a Frenchman the power over good Belgian property. The Belgian Court, in which Bauffremont also sued, was inclined to take the same view; but finally put the plaintiff out of court on the ground that the French judicial separation had deprived him of all interest in his wife's property. A second Franco-German war, this time a war of pamphlets, arose over the case, and was bitterly waged between sundry learned professors of both countries. Under cover of the

smoke of battle the many-titled Princess withdrew, and may be living happily with her second husband till this day, though as her most distinguished ancestress, the first Princess de Chimay, was not content with a single divorce, our heroine has very likely imitated her and tried another. Divorce appears to be hereditary in some families.

Let us turn now to a more modest story of the middle class. One Elizabeth Hickson, a young girl of sixteen, and an heiress in a small way, was living in England in the year 1828. She was sought out by a rascal named Buxton, by whose honeyed but deceptive words she was induced to marry. The parties were secretly married, but never lived together, and Buxton's fraud having been discovered he was prosecuted, convicted, and sentenced to three years' imprisonment. After serving his term he appears to have quietly accepted the situation, and settled down in peace with another helpmate.

Elizabeth remained content in her single blessedness until she reached the age of thirty-two, when another wooer, one John Shaw, a student of law, paid his addresses to her in a more conventional fashion. His proposals were favorably received; but it was doubted (not altogether without reason) whether under the circumstances, the parties could safely marry; and a divorce was finally decided upon. Buxton was found, and (his

hope of profit from his marriage having grown cold) was induced by a payment of 40*l* for expenses and a contingent fee of 250*l* to go to Scotland and remain there until a divorce could be secured. Buxton accordingly went to Scotland, was followed by Elizabeth, and they were finally divorced in 1846. Shaw, meanwhile, fixed himself permanently in Scotland and became a member of the Scotch bar. He and Elizabeth were married in June, 1846, and lived happily together until his death in 1852; the widow lived nine years longer. Three children of the marriage survived; but upon their claiming their mother's property, her relatives attacked the validity of the marriage and the legitimacy of the children; the matter went through all the courts, and the Lords (degenerate representatives of the honor and chivalry of England) held the children bastards. Without commending this cowardly and questionable punishment of the innocent children for the sin of the parent, one may at least rejoice that the Court's attitude toward fraudulent divorce is unmistakable.

It is clear that in every state spouses who desire to break their bonds may find out a way to do it; but it is equally clear that the courts are everywhere ready to declare such divorces illegal. In this good work no Court is more discriminating than our own Supreme Court.



## THE PROPOSED PENAL CODE OF THE UNITED STATES.

BY GINO CARLO SPERANZA.

A YEAR ago, writing on the condition of criminal jurisprudence in this country, the present writer said: "It seems clear that the juridic basis and form of our liberties have not kept up with the progress of those very liberties. Yet, what we call rights must have a counterpart or reflection in our laws. We may, while enjoying those rights, forget that the juridic basis on which they stand is crumbling with age. . . . While we are in full possession of our rights, we need no laws to guarantee them; but it is when those laws are encroached upon that there arises the necessity of juridic sanction for them."<sup>1</sup>

No better illustration of the backwardness in the development of our criminal jurisprudence could be given than the Proposed Penal Code of the United States which our next Congress may enact into law. That its adoption even in its present form will be an improvement on existing Federal legislation of a penal nature, only intensifies the fact of the defective condition of our Federal criminal law.

Three Commissioners were appointed a number of years ago, by Act of Congress, to "revise and codify the criminal and penal laws of the United States;" that the Commissioners had a very difficult task before them, no one can doubt who is in the least conversant with the defective material on which they had to work. The very imperfect original Crimes Act of 1790 was somewhat improved by the Crimes Act of 1825; but even this left much to be desired. As originally drawn by Judge Story, this bill would have been a fairly comprehensive criminal Code, but through the disfavor of the members from the South it failed to pass in the House. It was finally adopted in a

very crippled condition, as the Crimes Act of 1825, substantially re-enacted in the Revised Statutes of the United States. The Proposed Federal Code is an attempt to remedy the many imperfections of the existing law.

If the Commissioners have given us nothing better than the Proposed Penal Code embodies, it is not that they failed in any measure, to do the most of a very difficult task, but rather that the average of professional knowledge of criminal law is so low, the number of Americans of ripe scholarship in this field of jurisprudence which counts eminent students in Europe, is so small, and the interest in this vital branch of law is so lukewarm, that it is useless to expect a Code abreast of modern penologic and criminologic studies.

That the Commissioners were themselves far from satisfied with the result of their labors, is evidenced by their requests for suggestions sent to men of experience and learning, both abroad and here. It has been my privilege to see some of the suggestions made in response to such requests, and it will be my endeavor in discussing the defects in the Proposed Code to give some consideration also to some of the suggestions made.

Let it at once be said that the Proposed Code deserves criticism not only in so far as it takes practically no cognizance of the progress made in penologic science, but also as being in various particulars much inferior to existing penal Codes, both abroad and in some of our own States. That it takes no cognizance of penologic and criminologic progress may, in a measure, be excused, in view of the prejudice in some quarters against "European-made laws," and the proverbial conservatism of the Bench and Bar. This may be excused; though, as a progressive nation, we may hardly feel proud of an

<sup>1</sup> "The Decline of Criminal Jurisprudence in America." Appleton's *Popular Science Monthly*, February, 1900.

unprogressive Code. But we cannot excuse that the Code of the Nation should be lacking in those elements of definiteness, accuracy, orderly presentation and clearness, which should be attributes of legislation of vital importance; that it should be inferior in many respects to the Codes of some of its States; that it should both re-enact provisions which have been discarded in enlightened forums, and omit others which no sovereign power can omit from its juridic system; that it should look for light to past darkness, rather than to the sound experience of the past and the best thought of the present.

This is a serious indictment, and proof must now be adduced to sustain it.

It is obvious that a Federal Code must provide for crimes which State Codes take no cognizance of—such, for instance, as offences against the coinage, offences against the postal service, offences against neutrality, and so forth. Hence, no comparison is possible between the provisions of the Proposed Penal Code on these points and provisions of a like nature in State Codes. Nor would a comparison between them and corresponding provisions in the Codes of foreign countries be of much value, considering the inherent differences between the juridic structure of the United States and other Governments.

Regarding those provisions which may be said to be exclusively within Federal jurisdiction, we can, by the limits of this paper, consider only the most glaring omissions.

The power and duty of maintaining its treaty obligations within its territory is conceded an essential attribute of every sovereign power. For a nation to bind itself to protect the life and property of aliens within its territory and when called upon to do so to claim inability to enforce its obligations, is a curious anomaly in international law. Such an anomaly, or rather such juridic helplessness in our Federal law, has been repeatedly forced upon our atten-

tion in the case of foreigners killed by our citizens without due process of law. The refusal of our government to pay compensatory damages for such outrages—except as a matter of courtesy or comity—is held by not a few as a proof of our overpowering greatness and strength before the civilized world. But every thoughtful man must see that our inability to maintain our treaty obligations in this respect is an element of weakness, not of strength,—a source of disgrace not of admiration, before civilized nations. This question has been before us so long, and has been so widely and ably discussed, that it is surprising that the learned Commissioners should have not merely omitted any provision in the Proposed Penal Code to cover this lacuna in our law, but given no extenuating reason for such omission in their report.

Judge Simeon E. Baldwin of Connecticut, who has given special attention to this question, has submitted to the Commission a proposed draft of a bill "To enforce treaty obligations for the protection of foreigners against acts of violence," which is a model of clearness and conciseness. The adoption of the Proposed Code without the incorporation of a provision covering in substance Judge Baldwin's suggestions on this point, will be a stigma on our honor as a sovereign power.

The provisions of the Federal Code apply, of course, only to certain jurisdictions and to certain persons over whom State laws have either no force or only concurrent application. These are specifically enumerated by the Proposed Code. There seems to be an unexplained omission of importance on this point. In semi-civilized countries American citizens accused of crime committed in such territories, are tried before American Consular tribunals. What shall be the *lex fori* in such cases? Surely it should not be left to the choice of the consular authorities, but a uniform law should be prescribed. Obviously the Federal statutes should apply in such cases. I am informed that certain consuls follow the Code of the District of

Columbia, but there seems no warrant in law for this. Certainly the interests of justice and the dignity of our name abroad demand that the Federal Code should prescribe a uniform procedure in such cases.

It is the proposed Federal provisions regarding offences against the person and property, however, that are most open to criticism. Here comparisons are easily made; a wealth of precedents and juridic learning on enactments of this nature are readily available, and defects in this particular are least excusable. It cannot be contended that most of the definitions of crimes of this class have been purely academic and experimental; still less that the force of words in provisions of this nature has not been tested or has received no interpretation. It might be said without exaggeration, for instance, that the definition of no crime has been so widely, carefully, and long considered for centuries, as that of the crime of murder. Despite all available material, how have the Commissioners defined this capital crime? "Whoever, being of *sound memory and discretion*, purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery or burglary, kills another, is guilty of murder in the first degree, and shall suffer death (Sect. 269 P. P. C.)."

If antiquity is a test of soundness in the definition of crimes, the Commissioners may pride themselves on having given us one juridically mouldy. To find an equally unsatisfactory test of responsibility as is here laid down, we have to go back nearly four centuries and to get our authority from no less antiquated jurists than Coke and Fitzherbert. In the earliest recorded case, passing on the question of insanity, (*Reniger v. Fogoffa*, 1 Plowden Reports 19, decided in 1551) it is laid down that "if a man *non sane memoriae* kills another . . . he has not broken the law because he had no *memory* nor *understanding*."

Lord Coke in the *Beverley* case (4 Coke

123 b) enumerates among the *non compos mentis* "he who was of good and sound memory, and by the visitation of God has lost it."

But this test was so obviously bad that it was discarded by the Courts themselves even before medical science proved its worthlessness. Why the Federal Code should go back to Coke for a test of insanity, is not clear. From the scientific point, no less than from the juridic, no more unsatisfactory test could be found. Sound memory is possessed by few, and especially is it lacking in those persons who suffer from epilepsy, sexual and nervous diseases—so prevalent among the criminal classes. "Discretion" is, presumably, a combination test of sanity and age, as the Proposed Code makes no provision for presumption of irresponsibility from age. But even granting the necessity of the use of "sound memory and discretion" in the definition of murder in the first degree, it is hard to understand why such "tests" are omitted in the definition of crimes where "sound memory and discretion" are equally essential ingredients of the crime, if not more so. Why omit them in murder "by obstructing or injuring a railroad" (P. C. Sect. 270), in murder in the second degree (Sect. 271), in manslaughter (Sect. 272)? And are they not obviously essential in the case of "criminal negligence of steamboat officers" (Sect. 270), "machinists" (274), or "owners of vicious dogs" (275)?

If against this it is claimed that the expressed element of malice used in these sections necessarily includes the elements of "sound memory and discretion" (which is very doubtful) then the use of these terms in the definition of murder in the first degree, is surplusage of a dangerous character in a penal statute.

Equally loose and inexact definitions are found in the case of other important crimes as given in the Proposed Code. Thus, robbery (Sect. 287) is defined, in substance, as "stealing" from the person by violence. But the Code nowhere defines "stealing," which is a word of loose signification, lack-

ing exact juridic meaning. This defect is accentuated by the addition of the words "and taking." Whoever by violence "steals and takes," reads the section. But felonious taking is stealing, and hence such repetition is surplusage. Surplusage, however, especially of this kind, is dangerous in penal statutes which are always strictly construed.

Likewise, the definition of larceny (Sect. 308) furnishes an example of useless verbiage. "Whoever takes *and carries away*" introduces a new element in the definition of this crime. There must be an intention "to steal or purloin." To purloin means "to practice theft" *i.e.*, to steal, which adds some more unnecessary verbiage. Criticism of this nature may appear to the lay mind as academic and hair-splitting; but it must be remembered that in juridic interpretation every word in the definition of a crime stands for something, and its presence or omission has decided weight. As before stated, penal statutes are strictly construed; that is, the Courts will adhere literally to their provisions, will restrain interpretation as much as possible to the letter of the statutes, and if there is a doubt, will give its benefit to the one who is sought to be held under their provisions. Hence arise what are known as "technical defences," which lawyers are not precluded from interposing in the defence of their clients, but which result in cases of glaring miscarriage of justice, allowing criminals to escape, and destroying public confidence in the majesty of the law.

It is impossible to enumerate in detail all the objections that might reasonably be made to the Proposed Code. In the few reports made to the Commissioners by persons to whom it was submitted for suggestions, which I have had an opportunity to examine, objections, criticisms, additions and suggestions have been made to over one hundred specific sections in the Code. Of course, most of these are of minor importance, some of them possibly unpracticable or too radical, many perhaps representing the individual hobbies or pet theories of the critics who

make them. No legislation can be enacted that will satisfy everybody and receive universal approval. But that men who, by training and study, are specially competent to speak on such a subject, should file so many objections, is very significant. It is especially important, if we bear in mind Blackstone's words on the importance of careful criminal legislation. "Equal precaution," he says, "is necessary (as in the drafting of civil laws) when laws are to be established which may affect the property, liberty, and perhaps the lives of thousands"—for it is in effect "the enacting of penalties to which a whole nation should be subject."

But irrespective of all these criticisms to specific sections or to specific omissions, the general impression made by the Proposed Penal Code of the United States is that it is lacking in what might be called the "modern spirit." Yet, it is this which one would naturally expect in the Code of a young, great, and progressive nation. The work of the Commissioners was probably hampered not only by the condition of criminal studies in our land, but by the very Act which created their Commission; they had, of course, to respect the past, propose no experiments, and enact no theories. But there is conservatism which is stagnation. The law of the land, while respecting the past, must stand for progress and advance; legislation must reflect the best thought of the nation, it must take cognizance of science as well as of past juridic learning. As far as the Proposed Federal Code is concerned, all the experience of prison reformers from Howard to Brockway, is as naught; all penologic study from Beccaria to Ferri, has shed no useful light; juridic learning from Stephen to Pollock has left no impress, and the science of mind from Pinel to Maudsley, might as well have been undeveloped. It is an old Code with a new coat of whitewash to make it look new. But no spirit of modernity breathes through it; it bears not the stamp of youthful strength.

It is safe to prophesy that, if passed at all,



it will be passed in practically its present form. The only penal legislation that will interest Congress will be that aimed at anarchy. In righteous anger over a heinous crime, the interest of the country will be stirred only in this one line, because the function of the law in such cases has been sadly and forcibly brought to its attention. But the protection of our magistrates and officers is but one way of safeguarding the majesty of the law and defending the body politic. The only sure way is to make all laws just, according to the best standards not only of practical morality and defensive means, but also of science. For it must be borne in mind and thoughtfully pondered

upon, that "The beginning of the government of law was the Criminal Code for the repression of crime and the defense of society from criminals. Criminal law is the foundation of the whole edifice of human laws; its integrity and efficiency, the most essential to the common welfare of them all. It should naturally and logically; as the plant and germ, the essence and supreme principle, the cardinal function of them, hold the position of honor and highest respect among laws; its practice should be the most reputable branch of the legal profession instead of the least honorable."<sup>1</sup>

<sup>1</sup> Henry W. Boies, "The Science of Penology."

## GENTLEMEN OF THE JURY.

BY DOUGLAS MALLOCH.

I HAVE had more or less experience with juries. I hasten to assure the anxious reader, however, that never has my personal liberty been in one's hands. Thus far I have managed to avoid meeting a jury face to face, so to speak. But I have mixed more or less with jurymen—grand, petit and coroner's. When I have been at home I have sat on juries, and often when I have been away from home I have read about their verdicts and wanted to do so.

The law guarantees to every man a trial by twelve of his peers. It is a great right, and yet I have known men who have gone clear across the continent to avoid claiming it. We boast about our jury system, but I have never seen a man yet stand up before a jury and seem tickled about it. The strange thing about it is that some of the jury dodged the situation quite as hard as did the defendant.

I do not know why a man should not like to serve on a jury—unless it is because of the arguments. In ancient Greece the Grecians fought for the honor of serving on juries—and they could not draw ten cents

mileage and only pay five to the railroads, at that. They could not play sixty-six and high five to while away the tedium, waiting to get in an extra half day.

A man who succeeds in breaking into the jurymen's class ought to be proud of it, for he has accomplished something. And incidentally I will interject a hint for the benefit of the man who does not want to serve on a jury. If you do not want to sit on a jury, try to. Make somebody believe you want to get a chance to deliberate on a certain case and you will be put through an interrogatory hopper that will cut short your apparent aspirations of a jury-like character.

After you have sworn to true answer make to such inquiries as may be put to you touching your competency to sit as a juror on the trial of this case the bombardment will commence. There will then occur a conversation between yourself and counsel something like this:

Q. Do you know anything about this case?

A. No, sir.

Q. Do you ever expect to know anything about it?

A. Are you going to conduct the case?

Q. I am.

A. Then, no, sir.

Q. Do you want to know anything about the case?

A. No, sir.

Q. Have you read anything about the case?

A. Yes, sir.

Q. I thought you said you did not know anything about the case.

A. I don't. I read about it in *The Evening Fake*.

Q. Have you any opinion?

A. Yes, that I haven't any.

Q. Did you ever have an opinion?

A. Not while my wife was present.

Q. Did your father ever have an opinion?

A. The Supreme Court gave him one that said, "Conviction affirmed."

Q. You had a brother who was cashier in a bank; did he ever have an opinion?

A. No, but the stockholders did.

Q. Can you read?

A. Everything but Scotch dialect.

Q. Do you use tobacco in any form?

A. Yes, any form.

Q. Do you ever drink?

A. Thanks, but take one yourself first.

Q. Do you know anything about the fundamental principles of law?

A. Yes, sir; clean breaks and no hitting in clinches.

Q. Anything else?

A. Well, every man is presumed to be guilty until he is proven innocent.

Q. Have you served as a juror in this court within a year?

A. No, sir; our supervisor has it in for me.

By this time counsel will have come to the conclusion you are anxious to get on this particular jury. He will hurriedly ask the defendant in a hoarse whisper if he has ever run over you with a bicycle, or if his dog has ever bitten you in the leg. Then

he will lay his finger on his forehead and think until the courthouse wobbles trying to devise some questions that will put you out of business as a juror. Finally he will pop something like this at you:

"Did you ever ask a man if it was cold enough or hot enough for him?"

This is your cue. If you do not want to sit on the jury simply answer yes. The attorney will then gaze triumphantly at the Court, His Honor will rub his eyes and exclaim, "Stand aside," and all is over.

Speaking of juries, brings to mind the first case that was tried in one of the pioneer counties of Missouri in the early days. There had been crimes committed in this county before, but never had it occurred to the citizens to make the trial a strictly formal function. It so happened, however, that a roustabout with an appreciation for good horseflesh had been caught some twenty miles from camp one day riding away the best broncho in the place. The date was July 2, and it suddenly occurred to the chairman of the executive committee for the Fourth of July, always on the lookout for novelties, to have the fellow tried by jury as one of the features of the celebration. The scheme at once met with popular acclaim. The respondent, by name Buster Pete, was locked up in an improvised jail in the cellar of the "HO-tel," where he succeeded in assimilating a jag from an unguarded cask of forty-rod that raised him considerably in the eyes of the community. Indeed, as the Fourth approached there began to creep about a doubt of his guilt. There was nothing really to give a rumor of his innocence credence, but it added zest to the proceedings and drew out the biggest crowd the county seat had seen since the hotel was opened with a grand ball.

The presiding judge, who had also been marshal of the parade and orator, besides helping out the hotel bar-tender during the rush, called the case as soon as the noonday dinner had been eaten. The trial was held in the bar-room, which also served the com-

munity for church or whatever might be required of it. The prosecuting attorney was a man who claimed he had had employment sweeping out a lawyer's office in his youth and therefore knew something about the law. A travelling evangelist undertook to defend Buster Pete. It did not require much effort to get twelve men to swear they knew nothing about the case and did not possess an opinion concerning it.

The evidence was brief and conclusive. The horse was produced in court and introduced in evidence. The prosecuting attorney wanted it marked "Exhibit A." This precipitated a warm discussion as to whether a branding iron or a paint brush should be used, and the court ruled in favor of the paint brush, as the horse had one brand on him already. The court evinced an unusual interest in the horse, which was not explained until his charge to the jury was delivered. That produced a sensation.

"You have sworn, gentlemen of the jury," he said impressively, "to give the respondent here, Mr. Buster Pete, the gol darned hoss thief, a fair and impartial trial, and this here court expects you to do it. The court is sot on havin' a fair and honest verdict rendered in this here case, according to the law and the evidence and the judge's charge. If, after considerin' of these, you find the respondent guilty, then he is guilty; if, after considerin' of it you find him not guilty, then you are a lot of lunkheads and this court will take the case under advisement. The court is pur-tick-u-lar-i-ly anxious an honest verdict should be had in this case because, although it might not have been known to you, I got this hoss on a mortgage only last Sunday, and this hoss was the property of this court. If you find this respondent not guilty this court will fine you all for contempt and confistikate your jury fees. You may retire now and consider the evidence, and may the Lord have mercy on your souls."

This charge was not the last of the surprises of the day, however. It had been

supposed after hearing it the jury would not be long at agreeing on a verdict. There was no jury-room available, so the jury was put in a corncrib to deliberate.

Those who had anticipated a speedy end of the case were doomed to ill-concealed disappointment. The jury did not arrive at a verdict in ten minutes or twenty or thirty. Their session dragged out into an hour, but there was no verdict. It was three o'clock, then four, and finally five, but still no verdict.

The sheriff had stationed himself a short distance from the crib and kept the crowd far enough away so it could not hear what was said in the jury room. The crib was seen to rock in a dangerous manner, however, several times, as though the jurymen were wrestling with some knotty problem of law, or each other.

There was one jurymen named Hank Peck, and by some unaccountable method of thought transference it became known to the crowd that Hank was arguing for an acquittal. Although Hank's wife had not had anything to do with the case, she was in part responsible for this condition of affairs. There are women who are Tartars. But Hank's wife was a cream of Tartars. For twenty years she had kept Hank saying "Yes, Melinday," and this was the first time Hank had ever had a chance to have an opinion and stick to it. To keep eleven men busy for two hours to make him give in was a joy of which he had never even dreamed.

Hank might be out in the corncrib arguing yet, if the presiding judge had not brought things to a head in a decisive way. After the jury had reported to the sheriff it had not yet been able to agree upon a verdict, the court ordered the jury brought in to the courtroom. The crowd, disappointed and somewhat angry, filed in after it. The judge looked very stern. Someone had whispered to him that Hank Peck was trying to "hang" the jury.

The court's remarks were brief and incisive. "I understand that one of you fellers

is tryin' to hang this jury. Now all I have got to say is this—that if this jury don't agree in fifteen minutes I guess there is enough disinterested citizens out here to do it ourselves."

Amid murmurs of approval the jury retired again. Four minutes later it delivered its verdict, and everything was over in plenty of time for the fireworks in the evening.

## LEGAL CONDITIONS IN ISLAND OF NEGROS.

By W. F. NORRIS, Judge of the Special Court of First Instance for the Island of Negros.

THE course of justice, in this Island of Negros, has been somewhat wayward; in fact the legal situation would paralyze any one except a Philippino, who in matters pertaining to the judiciary would be startled at nothing. The Island of Negros is divided into two provinces, Oriental and Occidental Negros, which division follows the former Spanish system, the entire Island, with the district of Antique in the neighboring Island of Panay, constituting the Tenth Judicial District, which is presided over by a native judge. A Special Court, however, has been organized by special law, to hear and determine all cases which have accrued previous to the sixteenth of June last in the provinces of the Island of Negros. There seems to be special need of the special tribunal; investigation shows an almost complete stagnation of judicial business, in fact, to all practical purposes the doors of the courthouse may as well have been closed during the past two years or thereabouts. There seems to be an utter insensibility to the rights of the poor; nearly three hundred men were in prison at the time of the establishment of the Special Court, and over seven hundred criminal cases were on the files, in addition to a large number of civil cases. Men have been tried by the Special Court who have been in prison many months waiting a hearing; one defendant a year and one month, another a year and three months, and another a year and six months. It is im-

possible to tell how long men accused of crime would have been imprisoned without a trial, but for the fact that about the time of the earliest revolt against Spain there was a general prison delivery; this occurred in November 1898, so all prisoners have been confined less than three years, but several however, have been in durance between two and three years awaiting to know by judicial declaration whether they are guilty or innocent.

It must be remembered that arrest and imprisonment in this Island does not mean the same as arrest and confinement in jail in one of our States. The prison is the same before and after conviction; the man in prison under charge of having committed a criminal act and waiting trial, is kept at hard labor just the same as the convicted criminal.

The course of justice has been slower since the revolution than during the days of Spanish domination. The present judge has the reputation of being a very honest man and a good lawyer, but exceedingly slow, so slow in fact that he may be said to stand still, while the prison is filled with untried prisoners, and the civil docket with cases urgently demanding hearing. To the innocent man in prison waiting years for deliverance from unjust punishment, it makes but little difference whether the author of his oppression be a weak good man, or a wilful oppressor. The evil is inherent in the system; there is an absence of moral sense

among the native people of the higher class, as to their relations to the lower classes. The situation in these Islands is somewhat similar to that in Europe during the middle ages,—the great families rule the land. The Lazuriaggas, the Mapas, the Lacsons, are the Capulets and Montagues of the Island of Negros. So it is throughout the Philippines,—the rich families are everything, the people are nothing. The rich Philippino can say like Louis XIV. "I am the State," and the poor are too simple and ignorant to contest his supremacy. Notwithstanding what we have done to ameliorate the condition of the mass of the population, and relieve them from superstition, slavery and poverty, these very men would rise against us *en masse* at the instigation of those from whose oppression we are seeking to liberate them, and would restore their masters to power. It has been said, and I think with truth, that we are disliked by both Spaniard and Philippino, by the former for reasons which are obvious, by the latter for the reason that we will not permit them to take the place of the Spaniard and rule and oppress their countrymen. There seems to prevail in the provinces of the Archipelago, or some of them, a system of slavery, somewhat similar to the peonage of Mexico. Servants will get in debt to their master, and remain his debtor throughout life. I have been told by an official of the court, one of the most reliable men I have found in the Island, that it sometimes occurs that, when a servant leaves the service against his master's will, the latter trumps up a criminal charge against him of stealing and taking with him personal property of the master or his family. This condition of the moral world of the Philippines makes it exceedingly difficult to administer the criminal law in such way as to do justice to State and individual. Sometimes it is well nigh impossible to determine whether the alleged criminal at the bar is a thief, as charged, or the victim of an unscrupulous master, who is trying to wreak his vengeance through the criminal law, on

a servant who has dared to leave his house and service against his will.

Acts of this character may be accounted for by the callousness of the public mind as to anything pertaining to the rights of the common people. The primary principle of English law guaranteeing protection of life, liberty and property to the meanest subject or citizen of England or the United States, is not only unknown but utterly unappreciated in this country. Their very trend of thought is out of sympathy with it. Life is lightly regarded by the Malay-Philippino. Property is limited to a few aristocratic families, and closely held by them. Liberty is mouthed over by prominent Philipinos, prating, after the style of the French Revolution, of liberty, equality and fraternity, in public assemblies, where certain would-be leaders are ever anxious to air their eloquence for the edification of the public and their own glorification.

There is probably no section of Europe where the spirit of the feudal ages lingers as in the Philippine Archipelago. This is manifested in the monasteries, the religious fiestas, with the long procession of priests and people bearing lighted candles. Looking on the *padres* walking along the Lunetta or marching in the solemn procession, I am reminded of the lines of Scott:

"The holy fathers, two and two,  
In long procession came."

And certainly the peasants of England, France and Germany were imprisoned in the dungeons of the nobility with no greater disregard of justice than has been done right here in the Philippine Islands during the past two years. At the present time a woman is confined in the public prison awaiting sentence; she has been there some twelve months, waiting judgment, not trial; she has been tried, the only remaining step being to find her guilty or not guilty, and if the former, to pass sentence, if the latter to order her discharge. The woman was a house servant who left the employ of her

mistress, the latter charging her with stealing money and clothing. She was arrested and confined in prison, where she has been ever since. A few days ago the regular judge of the district, before whom her case was tried, left town to make his semi-annual circuit, which will take him away some three months, leaving the woman in prison and still awaiting the judgment of the court. The accused states that the daughter of her mistress whipped her so severely that she left, which statement is not at all improbable, and is in keeping with the practices of the country. Recently a *muchacha*, or female servant, came into the court room requesting the Judge of the Special Court to call up the case of three ladies who had been some time under the charge of cutting off the hair of the complainant, and whipping her, the alleged cause of such discipline being that the servant wished to leave, or did leave, their service against their will.

On leaving the courtroom Saturday, the judge of the Special Court noticed at the head of the stairs, a woman with two little children and a babe in her arms. On inquiry it was ascertained that the woman had walked in from her pueblo, eight miles distant, with her children, to learn the fate of her husband, without whom, she said, the children would starve. There seemed but little danger of immediate starvation, as the children were plump enough to exist some time on accumulated fat, and were in the fashion of the country, in having an extremely limited wardrobe. The case illustrates, however, the situation in this Island. The husband and father of this wretchedly poor family has been in prison seven months without it being determined whether he is guilty of any crime.

A case was reported to me the other day which would be ludicrous were it not so serious, especially for the victim. Some eight or nine months ago a fellow was arrested and kept in prison seven months; at the expiration of that period he was liberated, there being nothing against him, the evidence show-

ing that he was arrested for being out after hours, but not guilty even of that offense; for at the time of his detention he was going to his work at five o'clock in the morning. In the meantime, however, his wife had married another man and squandered his wealth, consisting of three hundred dollars; and now, as a consequence of going to his work at too early an hour, not a common fault with the Philippino, he wanders, wifeless and penniless, a fugitive in the land. I am hasty in stating that early work is uncommon with the natives; I should have remarked that too great diligence was not a frequent failing with them. To do them justice, they are early risers, and commence the day's work at an early hour, taking a long rest or *siesta* at noon. In the case just cited the fault was with an ignorant sentinel, in making the arrest, and much more in a judicial system, or rather procedure, that permits an innocent man, or any person accused of crime to lie in prison several months without a hearing.

The common people are exceedingly ignorant, as may be expected, and in some respects almost brutish, judged according to our standard of morality. A man was brought before the court charged with falsifying the records, and the progress of the trial showed that the defendant was the father of a child by his own daughter; subsequently, the daughter being about to marry, the defendant and his wife decided to adopt the child as their own, and with this intent caused it to be registered in the public registry of births as their own child; the prevailing law makes the act of falsifying the records so much more heinous an offence, that the crime of incest was ignored.

Human life among this race seems of decidedly less consequence than social or individual dignity. In a case still pending before the court, the defendant killed a woman by striking her three blows with a bolo, which national weapon is drawn freely on any and all occasions. In this particular instance the victim made remarks derogatory of the defendant, irritating to his punctilious

sense of honor; she called him a fool, which appellation, I am assured, is extremely offensive in the Visayan dialect, much more so than in Anglo-Saxon, being in fact, the most offensive term that can be used. This opprobrious epithet being hurled at the supersensitive Malay, he proceeded to avenge the insult by drawing his bolo and cutting the offender to pieces.

A somewhat similar case was before the court a short time since, wherein the outraged party, as the male head of the family, found it necessary for the proper maintenance of his dignity to nearly sever the cheek and ear of one of the female relatives who had talked about him among the neighbors and personally called him names, and, when expostulated with, had actually passed her fingers derisively between his lips. This mark of contempt was more than Malay human nature could endure, so drawing the ever ready national weapon, he taught the younger female member of the family a lesson in manners by slashing her across the cheek, almost severing the lobe of the left ear, and leaving an indelible brand on the face.

The mass of the people are by no means devoid of sensibility. Not many days since a fellow appeared for trial, whose looks were evidence against him,—a dark, sullen, stolid looking man. It seemed as though the bolo just naturally fitted to his grasp, a veritable descendant of the old time Malay pirates, who with creese between their teeth swarmed up the sides of the good brig *Betsy*, as she lay becalmed in the Sulu Seas seventy years ago, and massacred our grandfathers, or were sunk with their proas while attempting such massacre, by the old fashioned brass six-pounder on the good brig's deck. Well, it turned out that the evidence failed to show much of anything against the defendant, and before he was released, the court spoke a few words of counsel or admonition, which were duly interpreted by the provincial fiscal. As mention was made of his home, the tears started into his eyes, giving evidence that looks are deceptive with

this people. As a class, they are extremely fond of their homes, so much so, that when employed by the government to work on the railroad at a distance from their homes, they soon become homesick, for which reason so many desert that it was a serious question to procure an adequate labor supply for the public works. To obtain the services of a Philippino, and feel secure in such service, one should take the wife and family, as well as the husband and father, and then should take out a policy of insurance in order to enjoy a complete sense of safety.

The questions propounded to a witness would stagger an American lawyer unaccustomed to the procedure in vogue. What would the practitioner at home think to hear the prosecuting attorney begin his examination of a witness by the interrogation, "Why did you hit Antonio Maceo over the head with a bolo, thereby causing his death?" After the new code goes into operation, the Spanish and Philippino lawyer will be almost absolutely helpless; before a jury they would be as helpless as a child. The systems are in some respects very dissimilar, especially as to pleading and the manner of taking testimony, in which respects the legal system and procedure are as dissimilar as the English and Spanish languages. Under the existing law, while the code is, or shortly will be, American, the language of the courts is Spanish, and will continue to be such until the year 1906. So under existing conditions, the burden of learning a new language is on the American lawyer, that of learning a new system of legal procedure on the native and Spanish attorney.

In some respects, the Spanish code in force here is excellent in theory, its provisions being drawn with extreme care. It is probably true, as frequently remarked, that the evils under the Spanish regime were not in the laws, but in their administration, and in the procedure, which was attended with infinite delays and exorbitant cost to the litigant.

The legal conscience is not over sensitive in matters regarding the interests of the at-

torneys as a class, who seem to have been a close corporation in the enjoyment of exclusive privileges. Under the existing law, a disputed attorney's bill is by the court referred to two lawyers for determination. Such a disputed claim was recently referred by the Special Court to two members of the local bar, one of the referees being an American lawyer lately arrived in the Island, the other a native practitioner. The attorney from the United States reported that in his opinion the fees charged were excessive, recommending as the proper recovery an amount considerably less than asked. The native lawyer, one of the best and most reliable men in the Island, recommended the payment of the amount in full. While not directly approached himself, a friend of the American lawyer was given to understand that a hundred dollars was at his disposal in case he changed his finding; the friend, knowing the man, let it be understood that such offer would prove useless. While the matter was pending, one of the prominent attorneys of the bar remarked that there was an understanding among the attorneys that when the question of disputed attorney fees was submitted to two of their number according to law for determination, the amount charged would either be increased or remain unchanged.

A hard looking defendant was before the court on the charge of rape. The evidence against him was very strong, the testimony of the victim, her mother, and a young man, all concurring and showing that the accused entered the room where the girl and her mother were sleeping, that he took her by the hair and dragged her from the room and down the stairs, and forced her to go with him into the sugar field, where he obliged her to yield to him by force, threatening her with a dagger. When the mother interfered he threatened her with the same weapon, and prevented interference by a young man who was sleeping in the house, in the same manner; at least, the testimony of the latter was that when he attempted to interfere, the

accused threatened him with a dagger. This evidence was contradicted only by the accused in a rather weak denial of employing force. The case made by the evidence was about as strong as could be made, and established a most diabolical case of rape. At the termination of the evidence the attorney asked the somewhat startling question of the mother, "Do you forgive him?" As any question is likely to be propounded to a witness, and an objection on the part of opposing counsel is almost unknown, the Court supposed it merely an erratic interrogation put by counsel for the defense, with the design of mollifying the court and mitigating the penalty. The sequel proved, however, that the question was by no means a trifling one, and the answer that forgiveness was granted was followed by a request for the release of the accused, in accordance with the provision of the existing code that where the offence is condoned by the subsequent pardon of the offended party, the accused is to be discharged, and in case he has been tried and sentenced, the unexpired portion of the penalty is to be remitted whenever such pardon is granted, the criminal action being, under the Spanish law, considered a personal one which drops whenever condoned by the pardon of the individual interested, or the marriage of the parties.

One of the most common crimes during the past two years is "Robbery in Bands," as expressed in the Spanish. The Island has been infested by roving bands of petty thieves or robbers, who were in the habit of attacking houses, tying up the occupants, or terrorizing them, and taking away whatever they could find. Generally these raids were bloodless and unaccompanied with any great degree of force, and the property stolen of small value, being a little rice and some article of clothing, and if the robbers came across any hoarded silver dollars of course they would be appropriated.

There is an element of the pathetic in these petty robberies, for the people have been, and still are, wretchedly poor. In one



case the defendant admitted his guilt, but said that he was so poor that he stole the food to satisfy his hunger. In this species of crime it is often difficult to detect the real offender, the defendant pleading in defense that he was forced by the gang to go along with them, and that he escaped from them as soon as possible, which statement is by no means improbable, since in the past unsettled times such lawless bands were in the habit of impressing the laborers of the vicinity, probably for the purpose of swelling their command, to give them importance or the semblance of power. In this country it is hard to get at the reality of matter, deception being a second nature of the people.

Bands of robbers, somewhat similar to the Italian *banditti*, have existed from time immemorial. They form no part of the insurgent forces, but infested the country long previous to the insurrection against Spain, and may continue to frequent the woods and mountains long after the suppression of the insurrection against the United States, though their extirpation is a consummation devoutly to be wished, for the common good of the community, and particularly for the reason that it will be difficult to establish permanently new political institutions until peace and tranquility are completely maintained throughout the Islands.

In some instances atrocious crimes are committed by the outlaw bands. Only yesterday two men were before the Court charged with being accomplices in the crime of murder. The defendants were members of a band of robbers under the leadership of one Felix. The chief sent one of the number named Mariano to buy rice, entrusting him with one and a half pesos for that purpose; at a late hour Mariano returned without the rice, stating that he had lost the money gambling; thereupon the chief ordered him to be held by one or two of the band, which was done; he struck him across the neck with his bolo, another of the gang stabbing him in the body. In another case the father of the family was held or tied up

and tortured by applying a lighted torch to his naked body, after which he was taken out of the house and killed.

This Island has never been the scene of regular insurgent operations. Shortly after the uprising against Spain, in November 1898, a constitution and frame of government prepared in the Island of Negros was sent to Washington, with the request that it be adopted as the government for the Island. This system acknowledged the sovereignty of the United States, and was, perhaps, in a general sense acceptable to the Government at Washington, but in the then existing political conditions it was considered best to establish a semi-civil government, subordinate to the military authority at Manila, which was done, such government continuing in operation until superseded by the present government established by the Philippine Commission. Previous to the government established under the Military Governor at Manila, the people of the Island had set up an independent government, having no connection with that of Aguinaldo, Juan Areneta, a prominent native, being the first governor. This government, however, was short lived, giving place in a few months to that above referred to, established by order from Washington.

The Island of Negros has an area of 3467 square miles, with a population of about 500,000. It is said to be the richest island of the Archipelago, the principal product being sugar, in the cultivation of which, I presume, it is in advance of any other section of the country. It is a narrow island, being some 130 miles long from north to south, with a ridge of mountains extending through the middle. These mountains are heavily wooded, the hills and forests affording refuge to outlaw bands that infest the country and do great damage to the sugar plantations, as well as keeping the people terrorized or in a condition of disquietude. The chief of the mountaineer outlaws is a man known as Papa, or Pope, Isio, who seems to be a sort of veiled prophet among them, having the

power to bestow amulets which will turn aside any bullet, and render the wearer impervious to any of the enemy's weapons. It is true that wearers of the charmed insignia have been shot by bullets from the Crag or Mauser, but the victims uttered the exclamation, "Ah! ah!" when the bullet struck him, which broke the charm, the wearer of which must preserve silence.

The followers of Papa Isio seem to be the destitute, the discontented, the outlaw, perhaps refugees from the insurgent bands of neighboring islands, and from the robber bands that have, during the past two years, roamed over the island. They seem to be

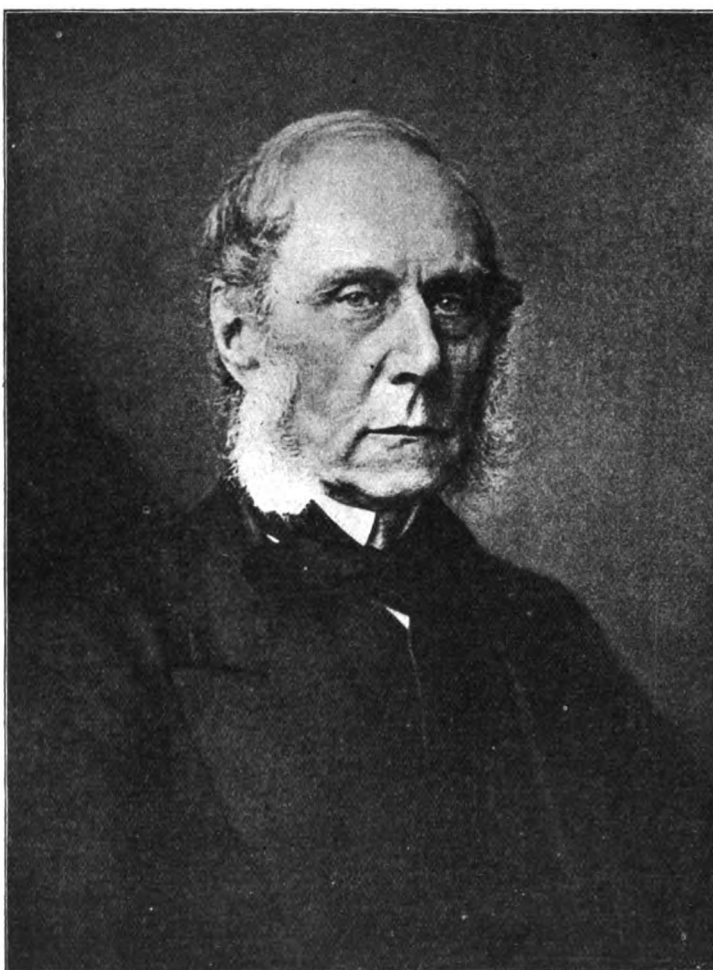
controlled largely by an agrarian sentiment, believing that if the large sugar *haciendas* are broken up, the land will be divided into small holdings for the benefit of the people. To this end they endeavor to discourage the planters by swooping down on the plantations, destroying the cane, and burning the sugar mills. Great loss has been sustained by some of the large sugar raisers by these incursions, especially by the Spanish land owners, against whom their attempts seem particularly directed, and who, for some reason, appear to have incurred their special enmity.

### THE LEGAL STATUS OF THE MOTHER-IN-LAW.

**I** UNDERSTAND that it has been finally decided by the Supreme Court of this State that the relation which existed between the whale and Jonah was that of landlord and tenant; and there are a number of very respectable authorities who seem satisfied to put Jonah and the mother-in-law on the same footing. With this I cannot agree. While it is true that many a man looks upon his mother-in-law as a sort of Jonah, that ought to be expelled from the bosom of his family and sent elsewhere to lay down the Gospel, still there are important differences between the two cases. In the first place, a man's mother-in-law enters his house on her own invitation, whereas Jonah was taken in and against his will. In the second place Jonah's entry was preceded by a violent storm, whereas in the case of the mother-in-law the storm usually follows. In the third

place, Jonah was cast out by the whale after a few days without even the formality of a notice to quit, whereas there is not a case on record where a man ever successfully got rid of his mother-in-law. And finally, the son-in-law is not a whale, but a very small fish, in the presence of his mother-in-law. Because of the ill-feeling sometimes, unfortunately, existing between the two, some have thought that she sustained her position in the family by a sort of feudal tenure, while others have put her down as a tenant-at-will, and this latter is possibly correct, it being understood that the will is her own. But whatever her legal status may be, it is now well settled that the mother-in-law is one of the ordinary hazards of the matrimonial enterprise, and therefore an assumed risk.—*Charles N. Travous, before Illinois State Bar Association.*





LORD SELBORNE.

## A CENTURY OF ENGLISH JUDICATURE.

## XI.

BY VAN VECHTEN VEEDER.

## HOUSE OF LORDS.

THE membership of the House of Lords as a judicial tribunal is confined by the Judicature Act to Lords of Appeal, *i.e.*, the Lord Chancellor of Great Britain, a Lord of Appeal in Ordinary (limited to four), or a Peer of Parliament who has held high judicial office. High judicial office means the office of Lord Chancellor of Great Britain or Ireland, a paid judge of the Judicial Committee of the Privy Council, or a judge of one of the Superior Courts of Great Britain or Ireland.

The House of Lords as a judicial tribunal has reached its highest usefulness under the Judicature Act. With a membership defined by statute, with a reasonable assurance of regular attendance brought about by relieving the Lord Chancellor from his ancient duties as a judge of first instance, the appointment of paid judges as lords in ordinary and the elevation to the peerage of several eminent and experienced judges, the composition of the court has given entire satisfaction. In sheer ability, with Cairns, Selborne and Hatherley in equity and Blackburn, Bramwell, Watson and Herschell in common law, no other English court in any similar period of its history has ever equalled it.

During this period there have been only four chancellors, Cairns, Selborne, Herschell and Halsbury. Cairns lived until 1885, and Selborne and Herschell (who was chancellor first in 1886), almost to the end of the century.

The most distinguished English lords have been Blackburn, Bramwell, Penzance, Field, Macnaghten<sup>1</sup> and Davey. Untimely

<sup>1</sup> *Solomon v. Solomon* (1897), A. C. 22; *Ooregum Gold Mining Co. v. Roper* (1892), A. C. 125; *Nordenfelt v. Maxim-Nordenfelt Co.* (1894), A. C. 535; *Tailly v. Official Receiver*, 13 A. C. 523; *Trevor v. Wentworth*, 12 A. C. 409; *Drummond v. Van Ingen*, 12 A. C. 284.

death deprived the court of the services of three of its most promising members, Han-  
nen, Bowen and Esher.

Watson was the ablest of the Scotchmen, the others being Gordon and Shand.

O'Hagan ranks at the head of the Irish contingent,<sup>2</sup> which includes Fitzgerald, Ashbourne and Morris.

In his obituary eulogy on Lord Selborne in the House of Lords Lord Rosebery happily compared Selborne with those great ecclesiastics by whom equity was originally administered. "There was something in his austere simplicity of manner which recalled those great lawyers of the middle ages who were also Churchmen, for to me Selborne always embodied that great conception and that great combination." Selborne (1872-74; 1880-85) was not only, like Cairns, an ardent churchman; he had something of the ecclesiastical cast of mind and impassive manner. But he had also that intuitive insight into legal principles and power of grasping and expounding facts which is the certain test of legal genius. He possessed in rare combination intellectual gifts, penetrating acumen, flawless logic and matchless erudition. He had an astonishing memory and the ability to arrange with accuracy and order the most complicated details. Withal he had the habit of patient industry without which intuitions are deceitful and gifts of exposition vain.

The terms in which a contemporary observer described his characteristics at the bar, bring out clearly the elements upon which his success was founded. "At this time

<sup>2</sup> *Maddison v. Alderson*, 8 App. Cas. 467; *Whyte v. Pollock*, 7 do. 400; *Rossiter v. Miller*, 3 do. 1124; *River Wear Commissioners v. Adamson*, 2 do. 743.

there were three great advocates before all others, Bethel [Lord Westbury], Palmer [Lord Selborne], Cairns. Each of them had his own points of superiority, though each was very good at all points. Cairns excelled in strong common sense and broad, lucid

the flank of a hostile position taken up by the court, such as Bethel would have attacked in front; rounding off an angle here, attenuating a difference there; bringing some previously neglected portion of the case into relief, relegating others to the background,



LORD O'HAGAN.

arrangement of facts; Bethel in force of exposition and direct attack on his opponent, whether counsel or judge; Palmer in power of work, in knowledge of his briefs, in ready memory and vast resources of case law, in subtlety and great skill in addressing himself to unforeseen emergencies. He could perform the most difficult operations of strategy, changing front in the face of the enemy. It was an admirable sight to see him turning

and so restoring the battle. What gave Palmer the superiority in these movements (apart from the great versatility and adaptability of his mind and his complete command of temper) was above all his perfectly accurate and ready knowledge of every detail of his case."

His marked characteristic as a judge was his profound knowledge of case law and his masterly dealing with it. In this respect he

has seldom been surpassed. It was his habit to extract the ruling principle of prior decisions, and then to trace the development of the branch of law under discussion. (*Aylesford v. Morris*, 8 Ch. App. 484; *Noble v. Willock*, 8 Ch. App. 778). From his con-

reasoning on a matter collateral to the main issue. This undue prominence of matters of minor importance and trains of reasoning running off into collateral matters, explains the absence of proportion which characterizes some of his work. But his statements



LORD FIELD.

servative regard for precedent he was essentially a sound judge. He was inferior to Cairns in terseness, clearness and force because he indulged himself in his remarkable gift of subtlety. Beyond certain limits subtlety ceases to be desirable in the exposition of practical rules of human conduct. While many of his opinions are masterpieces of luminous reasoning, he had too often a habit of pursuing a fine train of

of legal propositions are carefully worded with a far seeing regard for the future, and probably from no other judge's decisions could be obtained so few hasty, ill considered *dicta*.

Although he was great in council and dextrous in debate, he did not display in political life the marvelous adaptability which was so conspicuous in Cairns. In some ways he would seem to have been better



equipped in this direction than his great rival. He had larger and more genial sympathies, and his flowing, diffuse and digressive style was more apt to impress the mass of people

and fetch his arguments from considerations too purely moral and speculative to exert any considerable influence on public opinion. Hence the arguments by which he at-



LORD HANNEN.

than the highly concentrated manner of Cairns. But his ecclesiastical subtlety again hampered his influence. The stream of didactic moral sentiment which runs through all his work is in itself an admirable quality; but he was apt in his speeches to quit the special ground for which they were intended,

tempted to support a conclusion were often far more conspicuously vulnerable and far more offensive to his adversaries than the conclusion which he used them to establish.

As a law reformer alone Selborne would take high rank in legal history. The great law reforms of Brougham in 1832 and sub-

sequent years had been followed at fitful intervals by the great body of legislation which from 1847 onwards, under the guid-

ing ability by which alone such revolutions are accomplished.<sup>1</sup>

When Lord Blackburn (1876-87) was ap-



LORD DAVEY.

ance of Cranworth, Westbury and Cairns, had eradicated most of the perversities of the old procedure. But the most radical and comprehensive legal reform of the century was accomplished by Selborne in the passage of the Judicature Acts. He combined the patient diplomacy and command-

pointed one of the first Lords of Appeal in Ordinary under the Judicature Act it afforded satisfactory evidence to the profession that a new era in the court of final appeal had in reality begun. Blackburn had

<sup>1</sup> Some of Selborne's more important opinions are: *Maddison v. Alderson*, 8 A. C. 467 (statute of frauds); *Debenham v. Mellon*, 6 A. C. 24 (wife's necessities);



given abundant evidence of his complete mastery of the common law, and he soon showed that his grasp of Scotch and colonial and ecclesiastical law was no less strong. In chancery appeals he did not hesitate to express independent views, but he was naturally overshadowed by the authority of Cairns and Selborne. In common law appeals he was a recognized autocrat. It was not until the last year or two of Blackburn's service that Watson began to take a prominent part in English appeals, and the sturdy Bramwell did not become a member of the court until 1882. One may venture to say, by way of comparison, that this was the ablest period of Lord Blackburn's judicial service.

Lord Watson (1880-99) was not only the ablest judge contributed by Scotland to the House of Lords; he was one of the most remarkable judicial characters of his time. In the domain of Scots law, to which his predecessors had mainly confined their attention, he displayed at the outset his eminent qualifications for judicial office. But Lord Watson was not content to play a minor part. He proceeded to study English law; and as his confidence in his knowledge increased the modest expression of opinion which he had been wont to give in his earlier cases gave way, shortly before Blackburn's retirement, to those masterly expo-

Dalton *v.* Angus, 6 A. C. 740 (easements); Sewell *v.* Burdick, 10 A. C. 74 (bill of lading); Pearks *v.* Moseley, 5 A. C. 714 (bequest); Lyell *v.* Kennedy, 14 A. C. 448 (real property); Sturla *v.* Freccia, 5 A. C. 623 (evidence); Speight *v.* Gaunt, 9 A. C. 1 (trust); Bank of England *v.* Vagliano (1891), A. C. 107; Duncan *v.* Wales Bank, 6 A. C. 8 (bill of exchange); Harvey *v.* Farnie, 8 A. C. 43 (Scotch divorce); Mackonochie *v.* Penzance, 6 A. C. 424 (ecclesiastical law); Whyte *v.* Pollock, 7 A. C. 400 (will); Mayor of London *v.* London Bank, 6 A. C. 393 (attachment); Mersey Steel Co. *v.* Naylor, 9 A. C. 434 (contracts); London, etc., Ry. *v.* Truman, 11 A. C. 45; Drummond *v.* Van Ingen, 12 A. C. 284, Ewing *v.* Orr-Ewing, 10 A. C. 499; Minors *v.* Battison, 1 A. C. 428; Sarf *v.* Jardine, 7 A. C. 345; Singer Mfg. Co. *v.* Loog, 8 A. C. 15; Kendall *v.* Hamilton, 4 A. C. 504; Brogden *v.* Met. Ry., 2 A. C. 666; Capital and Counties Bank *v.* Henty, 7 A. C. 741; Erlanger *v.* Phosphate Co., 3 A. C. 1218; Dublin Ry. Co. *v.* Slattery, 3 A. C. 1155; Lyon *v.* Fishmonger's Co. 1 A. C. 662; Clyde Navigation Co. *v.* Barclay, 1 A. C. 790; Bradlaugh *v.* Clarke, 8 A. C. 345; Foakes *v.* Beer, 9 A. C. 605; Earl of Aylesford *v.* Morris, 8 Ch. App. 484; *Ex parte* Watkins, 8 Ch. 520; Cooper *v.* McDonald, 16 Eq. 258; Avers *v.* Jenkins, 16 Eq. 275; Freke *v.* Lord Carbery, 16 Eq. 461.

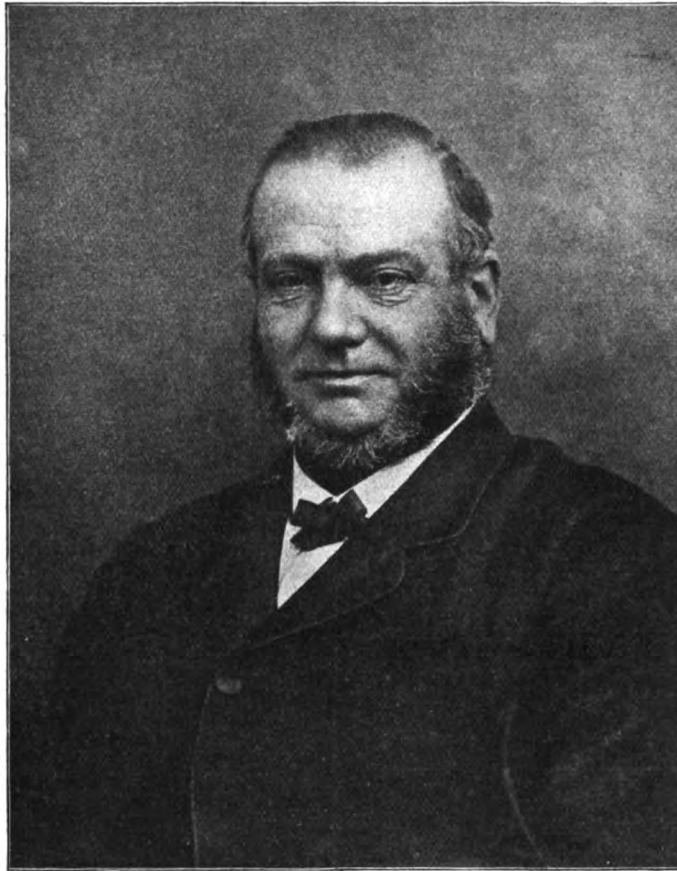
sitions of English law for which, after the death of Herschell, he was unrivalled by any of his associates. It is only necessary to mention in support of this statement such cases as Smith *v.* Baker, Allen *v.* Flood, Clarke *v.* Carfin Coal Company, Solomon *v.* Solomon, Macdonald *v.* Whitfield, Nordenfelt *v.* Maxim-Nordenfelt, and Mogul Steamship Co. *v.* McGregor. His long and splendid service in the Judicial Committee of the Privy Council would alone place him in the front rank of modern judges. His opinions in *Le Mesurier v. Le Mesurier* and *Abdul Messih v. Fassa*, on the intricate subject of domicile, to cite only two examples, are as luminous as they are exhaustive. In ecclesiastical appeals, also, Presbyterian though he was, he took a prominent part.

His knowledge of English case law was, under the circumstances, extraordinary; yet it can hardly be said to have exceeded his grasp of principle and certainty of judgment. Witness his sensible and suggestive reflections in refusing to adhere to a strict observance of the old doctrine with respect to restraint of trade: "A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to and for promoting the interests of its commerce must, as time advances, and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function when a case like the present is brought before them is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained it becomes their

duty to refuse to give effect to a private contract which violates the rule and would, if judicially enforced, prove injurious to the community." *Nordensfelt v. Maxim-Nordensfelt*, (1894) A. C. 514.

He rendered invaluable service to

But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due. A wrongful act done knowingly with a view to its injurious consequences, may, in the sense of



LORD WATSON

English law in eliminating the element of motive in civil wrongs. Nothing could be clearer than his exposition of this question: "Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary and natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad or indifferent.

law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. There is a class of cases which have sometimes been referred to as evidencing that a bad motive may be an element in the composition of a civil wrong; but in these cases the wrong must have its root in an act which the law generally regards as illegal, but excuses its perpetration in cer-

tain exceptional circumstances from considerations of public policy. These are well known as cases of privilege, in which the protection which the law gives to an individual who is within the scope of these considerations consists in this—that he may with immunity commit an act which is a legal wrong and but for his privilege would afford a good cause of action against him, all that is required in order to raise the privilege and entitle him to protection being that he shall act honestly in the discharge of some duty which the law recognizes and shall not be prompted by a desire to injure the person who is affected by his act. Accordingly, in a suit brought by that person, it is usual for him to allege and necessary for him to prove an intent to injure in order to destroy the privilege of the defendant. But none of these cases tend to establish that an act which does not amount to a legal wrong, and therefore needs no protection, can have privilege attached to it; and still less that an act in itself lawful is converted into a legal wrong if it was done from a bad motive.”

To literary form and refinement of style Lord Watson appears to have been wholly indifferent. Clear, direct and compact in expression, his opinions are nevertheless not without charm from their simplicity of diction and the occasional use of the quaint legal phraseology of his native land. Probably the best expression of this is his interesting opinion in the matrimonial case of *Mackenzie v. Mackenzie*, (1895) A. C. 384. “There can be hardly a more odious form of cruelty,” he says in one place, “than a deliberate attempt to wound the feelings of a mother through her affection for her infant child. It is nevertheless true that the

law of Scotland permits a married man to gratify his taste for that species of cruelty, subject to these conditions, that it must be practiced upon his own wife, and that he must stop short of injuring her health of mind or body or of rendering her existence intolerable. How far he can carry his experiments without exceeding the limits so prescribed, and thereby becoming guilty of legal *sævitia*, must depend very much upon the circumstances of the case, and, in particular, upon the victim’s capacity of endurance.”<sup>1</sup>

Lord Watson’s homely appearance gave little indication of his powerful intellect. He looked more like a genial country squire; indeed, we have his own assurance that his ambition did not extend beyond a quiet country life. Otherwise indolent, his extraordinary assiduity in the discharge of his judicial functions is the more remarkable since it was prompted solely by sense of duty.

<sup>1</sup> Lord Watson’s ablest efforts are:

English Appeals: *Allen v. Flood* (1898), A. C. 1; *Smith v. Baker* (1891), A. C. 325; *Scholfield v. Londesborough* (1896), A. C. 514; *Johnson v. Lindsay* (1891), A. C. 371; *Nordenfelt v. Maxim-Nordenfelt* (1894), A. C. 514; *Mogul Steamship Co. v. McGregor* (1892), A. C. 52; *The Bernina*, 13 A. C. 1; *Solomon v. Solomon* (1897), A. C. 22; *Trevor v. Whitworth*, 12 A. C. 409; *Bank of England v. Vagliano* (1891), A. C. 107; *Ooregum Gold Mining Co. v. Roper* (1892), A. C. 25; *Tailby v. Official Receiver*, 13 A. C. 523; *Wakelin v. London and S. W. Ry. Co.*, 12 A. C. 41; *London Joint Stock Bank v. Simmons*; *Bradford Corporation v. Pickles* (1895), A. C. 595; *Lyell v. Kennedy*, 9 A. C. 89; *Euraght v. Lord Penzance*, 7 A. C. 240.

Privy Council Appeals: *Le Mesurier v. Le Mesurier* (1895), A. C. 517; *Abdul Messih v. Farra*, 13 A. C. 431; *Huntington v. Attrill* (1903), A. C. 150; *Gera v. Ciantra*, 12 A. C. 557; *Haggard v. Pelicier Frères* (1892), A. C. 61; *Macdonald v. Whitfield*, 8 A. C. 733.

Scotch Appeals: *Mackenzie v. Mackenzie* (1895), A. C. 384; *Collins v. Collins*, 9 A. C. 205; *Ewing v. Orr-Ewing*, 10 A. C. 499; *Clarke v. Carfin Coal Co.* (1891), A. C. 412; *Commissioners of Income Tax v. Pemsel* (1891), A. C. 531; *Palmer v. Wicke* (1894), A. C. 318; *Caird v. Sieme*, 12 A. C. 326; *Roths v. Kirkcaldy Water Works Commissioners*, 7 A. C. 694; *Harvey v. Farnie*, 8 A. C. 62.



**HOW TORTURE WAS ABOLISHED IN FRANCE.**

BY GEORGE H. WESTLEY.

UP to near the close of the eighteenth century the laws of France were barbarously severe. When the celebrated jurist Le Page was appointed president of one of the highest courts, he endeavored to have the rigor of these laws mitigated, and especially he sought to have abolished the statute permitting torture to be applied to suspected or accused persons.

His colleagues, however, were for retaining the torture and employing it as often as occasion required. This stirred up bad feeling between M. le President and his associates, who did not hesitate to accuse him of seeking popularity at the expense of duty. The result of this quarrel was that the laws were enforced even more rigorously than before, and as it was M. le President's duty to pronounce the harsh decrees formed by his colleagues, he found himself in a position racking both to his pride and his sympathies. But he was resolved that torture should be abolished, and at length he hit upon a plan to save France from a continuance of this disgrace.

M. le Page had a foster-sister, Françoise, a beautiful young girl, who about this time had come to Paris and been installed in his house. One day after she had been there a few weeks, M. le Page missed a gold snuff-box ornamented with diamonds, an article he set much store upon as a family heirloom. A great stir was made over the loss, and at length the public prosecutor was called in to make a thorough search. He did not have to go far, the missing snuff-box was found concealed in the bottom of the foster-sister's trunk. Her guilt was plain. She was arrested and haled before the judges for trial. M. le Page's colleagues, relying as they said on his absolute impartiality, caused him to preside, as though the case were any other.

Françoise being examined denied everything. With pale, tearful face she told them of her innocence, declaring that she had had not even the thought of such a crime, and calling upon her foster-brother to save her from the disgraceful imputation. But M. le Page remained apparently unmoved by her pleading, and coldly commanded that the torture be used to extract the truth from her. This was immediately done. The girl's arm was bared and the terrible instrument applied to her hand. As the screws were tightened, crushing her poor fingers, she shrieked with agony. Still M. le Page let the fearful ordeal go on, though great drops of sweat upon his face showed how he was suffering.

At length the unfortunate girl could stand no more. She cried out that she was guilty and then sank upon the floor unconscious.

That evening there was a ball given at court. M. le Page appeared there and sought an interview with his Majesty Louis XVI.

"Sire," said he, kneeling before the king. "Sire, this day my foster-sister has been accused of theft, and being put to the torture has confessed the crime."

"Very well, she must suffer for it."

"But, sire, this theft was an invention of my own."

The king recoiled with horror.

"How! What means this?" he exclaimed.

"Sire, I wished to prove to France that the torture is a source of the most frightful injustice—the destroyer of truth and innocence. To this cause I have sacrificed the being whom I love best on earth. Oh, let her trials, sire, be not in vain!"

The king placed his hand on his forehead; his great officers stood by. Turning to them, he said:

"From this hour let torture no more disgrace the laws of France."

## A SEQUENCE IN CRIME.

BY H. GERALD CHAPIN.

THE student of crime as an abstract science must inevitably look upon Carlyle W. Harris with mixed feelings of admiration and horror. "He hath outvillained villany so far that the rarity redeems him."

For originality of conception the murder of Helen Potts has seldom been equaled. Its discovery was due only to a rare combination of events, so rare, indeed, as to almost warrant belief in the interposition of an overruling power, call it Nemesis, Eumenides, Kismet, Providence—what you will. A careful examination of the plan, as originally outlined, reveals flaws so few as to make success almost a certainty. These considerations, however, are more for the criminologists. When we come to view the matter from a more human standpoint we see a crime so hideously diabolical that we are forced almost to believe in the insufficiency of human punishment. One can imagine only the most frightful of Dante's tortures continued throughout eternity as a worthy expiation. In perusing the case as set forth in Volume 136 of the New York Court of Appeals Reports, the close analogy is immediately presented which existed between the prisoner and Shakespeare's Iago, the most masterly portrait of the polished villain ever sketched by the hand of man.

The murder involved no great amount of intricate detail. Unlike the Holmes case, for instance, its keynote was simplicity.

Carlyle W. Harris was born at Glens Falls, N. Y., in September, 1869, of good, though by no means prominent, family. He was, therefore, not quite twenty-three years old when brought to trial. His father and mother were not congenial and lived apart. The son, by mutual consent, was placed under the latter's charge. After a short career as book agent he joined a second-

class theatrical troop and spent two years playing minor parts. Then, through the influence of an uncle, Dr. McCready, the prominent New York doctor, he was entered at the College of Physicians and Surgeons as student of medicine. Of polished manners and prepossessing appearance, possessed of industry in a high degree, coupled with a considerable amount of ability, he made rapid progress. In the competition for a hospital appointment he stood at the head of between fifteen and twenty candidates. The position would have been his had it not been for the detection of the crime. Harris presented the not rare spectacle of mental ability coupled with moral imbecility. He is a type of what Lombroso would refer to as the instinctive criminal whose supreme selfishness stops at nothing to accomplish a desired end. Of strong animal passions, he was the self-confessed seducer of many young girls, never hesitating at crime to remove the evidence of guilt.

In the summer of 1899, while living with his mother at Ocean Grove, N. J., Harris met Helen Potts. She was then in her nineteenth year, a beautiful girl of affectionate disposition and remarkably pleasing in manner. During the remainder of the summer both Carlyle and his brother, McCready, called very frequently. Boating and tennis were the order of the day. The intimacy thus begun continued in the fall upon the return of both families to the city. Mr. and Mrs. Potts had few friends in town, and the Harris brothers were always welcome guests at the Sixty-third street apartment. Helen attended the College of Music while Carlyle was pursuing his medical studies. So frequent did the calls become that Mrs. Potts was finally forced to request that they be made less often. No suspicion of the drama that was being played before

her very eyes ever presented itself to the mother. Helen, so far as appearances went, seemed equally fond of both brothers.

On February 7 McCready invited the girl to visit the Stock Exchange with him on the following day. At the time appointed, however, it was Carlyle who called. Stating that his brother was unable to leave his office he offered himself as an escort. Instead of carrying out their expressed intention the pair went before an alderman and were married under the assumed names of Charles Harris and Helen Neilson. The matter, it was agreed, should be kept secret.

For a short time Harris continued to be no less assiduous in his attentions, and in the succeeding May followed the family of his wife to their summer home at Ocean Grove.

Then came the inevitable finale—for one, the weariness which follows sated desire, for the other, the dumb, heart-sick pleading for a return of the banished affection. Fewer calls, an altered bearing, trifling disputes gave the usual indications of a passion, now gone forever. It was time, too, for the true character of Harris to be presented in a more open light through his arrest as the keeper of a house raided as disorderly.

It was certainly necessary for Harris to keep on good terms with his victim. The marriage could not remain secret much longer. His wife imposed but one condition to her consent to a crime which would, it was hoped, obviate the necessity for an immediate disclosure. For his sake would she suffer the pain and incur the danger, but some one, not necessarily her mother, must be told of the marriage, lest by the manner of her death there should be cast an undeserved stigma upon her fair name. She had already learned to distrust her husband's promises. Miss May Schofield, a friend, was on a visit, and one afternoon a walk was proposed. After Helen and Carlyle had whispered together for a few moments the former announced that she had some letters to write and would join the others later. As they walked along, "Can you keep a secret?" Harris asked.

"Not if it is a very big one; don't tell it to me, please," was the laughing reply.

"I wouldn't, could I help it, but Helen insists."

"Then let me tell you the secret. You and Helen are engaged. I guessed that ages ago."

"Perhaps you didn't guess that we were married last February?"

"You can't mean," May exclaimed, "that you were secretly married and have told no one?"

"I do mean just that. Do you suppose that I would have any one know of the marriage?"

"If Miss Potts has not already told her mother I shall beg her to do so."

"You will do no such thing," Harris declared, angrily. "I put you on your honor not to tell, for my prospects will be utterly ruined if this marriage is known. I would rather kill her and kill myself than have this marriage public. I wish she were dead and I were out of it."

"Carl Harris, even in anger you should not say such things in my presence."

They returned to the house in silence, and found Helen on the steps prepared to join them.

"I have told her," said Harris. "May will urge you, Helen, to tell your mother, but remember your promise."

Later in the afternoon the wretched wife accompanied her betrayer. Returning pale and haggard, she went directly to her room, and did not appear again that day.

Though with doubtless the best intentions, the criminal had performed his work but ill, for, in the latter part of June, Helen left for Scranton, Penn., where she remained a month at the residence of her uncle, Dr. Treverton. A second operation was necessary, and it was performed.

In response to a telegram Harris came to Scranton and stayed there two days. If aught were needed to demonstrate his entire lack of affection for the cruelly wronged girl, his unfeeling demeanor would have been sufficient. To Dr. Treverton and another,

in conversation unprintable, he boasted of his ability to effect the ruin of chaste women through the use of drugs. In two instances, however, so he said, he had been obliged to submit to a marriage ceremony. He acknowledged the paternity of a child by his first wife, but confessed that in other instances he had removed all evidences of the illicit passion.

Then came the Drew episode. While his sick wife was being nursed back to life at Scranton, Harris, under the name of Graham, was requested to leave the Webster House at Canandaigua, N. Y., because of his licentious behavior with a young girl, Queen Drew.

"You had better marry some old gentleman with lots of 'mun,'" he told her; and upon her asking, "Well, what if I do?" he replied, "Oh, we can put him out of the way. You find the old gentleman and we'll give him a pill. I can fix that."

After what had taken place in Pennsylvania the truth could not very well be kept concealed from Mrs. Potts. About a week before college opened, in the fall of 1890, the three met in New York and lunched together. To quiet suspicion Harris asked the mother to go with him to the office of his attorney, Mr. Davison. A copy of the marriage certificate (he had been careful to burn the original) was procured from the City Hall and given to Mrs. Potts, together with an affidavit, verified by Harris, in which the fact of the marriage was fully set forth. The mother insisted upon the performance of a religious ceremony.

"There is nothing sacred to me in such a marriage as this," she declared.

"Well, I should say not," her worthy son-in-law answered. "I looked the old fellow up and he keeps a lager-beer saloon." He cynically proposed that if she were tired of the match it could easily be broken and no one be the wiser. "I would call that legalized prostitution," was the indignant reply.

Harris succeeded in persuading her that it was best to place Helen in a well known

school, "to fit her for the society I hope she may move in." At his earnest request she wrote to Dr. Treverton, asking that he refrain from making a threatened disclosure. For the time being the criminal had succeeded in his policy of delay.

On December 2 Helen entered the Comstock School in Fortieth street, from which six weeks later her lifeless body was to be borne.

Despite his temporary success the situation of Harris was becoming one of increasing peril. A confessed bigamist, the hero of numerous intrigues, he saw with affright the ruin which a public announcement of the marriage would bring upon his head. Never had prospects in life looked fairer. Acknowledged leader of his class, *protégé* of an eminent physician, he had every reason to look forward to a career of increasing brilliancy. Such announcement could not, must not be made. After frantic efforts to secure a further postponement for two years ("that Helen might take a course at Wellesley"), in January, he apparently acceded to the demand of Mrs. Potts that a religious ceremony be performed on the eighth of the next month, the anniversary of their marriage, "if," he wrote, "no other means of satisfying her scruples could be found." It was then that he resolved upon the commission of a crime, which would, he fondly believed, insure his safety forever.

About this time, Dr. Peabody, professor of *materia medica*, delivered a course of lectures on poisons, in which the speaker laid particular stress upon the difficulty of detection in cases where morphine had been used feloniously. To better illustrate his meaning samples of the drug were handed around in wide-mouthed bottles. The students passed these bottles from one to another, and were permitted to take out and examine the contents.

On the 20th of January, the day following that on which a letter had been received from Mrs. Potts, fixing the date for the ceremony, Harris went to the pharmacy of Ewen

McIntyre & Sons and requested the clerk to put up two dozen capsules of oil of sandal wood. It was explained to him that it would take some time, possibly half an hour, to prepare them, whereupon Harris, being, as

morphine, divided into six capsules. Power, the drug clerk, it was proved, carefully read it over, went to a poison closet and obtained the morphine, then placed a one-grain weight upon the scales and sufficient of the



CARLYLE W. HARRIS.

he said, pressed for time, declined to wait, and stated that he would take six only, if they could be put up for him immediately. The remainder he promised to call for next day. He then took from his pocket a prescription, signed "C. W. H., Medical Student." This called for twenty-five grains of sulphate of quinine and one of sulphate of

drug to balance it. He then called the attention of the second clerk, Manson, to this fact, and Manson verified it. This checking process was required by office rules in all cases where poisons were used. The quinine was then measured, and the mixture stirred in a mortar. On one of the scale pans a capsule was placed, together with a weight



of four and a fraction grains, while an equivalent amount of the compound was placed on the other. Each capsule was again weighed when filled. A direction to take before retiring was, by order of Harris, written upon the box cover.

We have described the process employed in some detail as it completely disproves any claim that death resulted through a druggist's mistake.

The criminal took the capsules home and removed the mixture contained in one, substituting in its place pure sulphate of morphine, to the amount of at least five grains, a perfectly frightful quantity when it is considered that half that amount is a lethal dose. This deadly pill he replaced in the box. The ease with which the fraud could be perpetrated is apparent when we consider that both morphine and quinine are white in color. Two of the remaining capsules he kept in his own possession.

On the afternoon of the next day a reception was given at the Comstock School. Harris had been introduced to Miss Day, the principal, as a friend of the family. He had, therefore, no difficulty in obtaining an interview with Helen. He then delivered to her the box containing four capsules. The girl had been complaining of headache and insomnia, and he had promised to bring her a remedy. On the next day the criminal started for Old Point Comfort, Va., where he remained a week.

On the day after his departure Helen wrote, saying that so far from relieving her headache the medicine had made it worse, and Harris answered from Fortress Monroe advising her to continue taking it by all means.

It was safe to assume that the deadly pill would not be taken last, so that there would be one or more left for analysis when the question as to Helen's death would be presented. As only a harmless mixture would be found, it would be assumed that natural causes were responsible. Then, again, the direction to take before retiring would insure

her passing away in sleep, with no opportunity on the part of a physician to observe the symptoms. It was certainly more than probable that her death would be set down to heart disease. Harris being away at the time, no one would think of connecting him with the catastrophe. Truly a cold-blooded plan, worthy of its callous inventor. It was not destined, however, to succeed.

"But when we in our viciousness grow hard,  
(O misery on't) the wise gods seal our eyes;  
In our own filth, drop our clear judgments;  
make us

Adore our errors; laugh at us while we strut  
To our confusion."

By an almost inconceivable chance the three harmless pills were taken first. On Saturday, January 31, Harris called upon his wife. What frightful self-questionings must have struggled within him for utterance. Did she suspect aught, else why had the poison not taken effect? One pill remained. A last opportunity was presented to save the woman who had sacrificed all for him—presented only to be cast aside without a single regret.

Mrs. Potts happened to be present and the three went shopping. Returning to the school, mother and daughter, after luncheon, went to the latter's room. In idly looking over the contents of her bureau Helen perceived the pill-box, and told her mother that she had been taking some capsules which Carl had brought, and that they made her feel ill. "In fact," she added, laughingly, "I am tempted to toss the last one out of the window, and tell Miss Day I've taken it." It is a ghastly incident for the mother to remember, that she advised Helen to continue, urging that quinine was very apt to make one feel wretched, reminding her that her father, for instance, was peculiarly susceptible to its effects.

The girl spent the evening reading and conversing with Miss Day in the school sitting-room. Her room-mates, Misses Carson, Cookson and Rockwell, were at a

symphony concert. Helen was in a very cheerful mood. On February 8 her marriage would be announced. One week only need elapse and she would stand before the world as Carl's wife. About ten o'clock she retired.

Helen complained of a feeling of numbness and a choking sensation. "I can't feel your hand at all, Frances. I believe I am dying."

The girls were frightened, and Miss Day was called. She found Helen unconscious,



HELEN POTTS.

Her room-mates returned in about half an hour, and found her sleeping. She awoke within a very few moments after their entry, and told them that she had had such lovely dreams, which she wished would go on forever. A few moments after they had retired and the light was turned out, Miss Carson heard her moan. She arose and went to her.

and immediately sent for Dr. Fowler, the school physician. The latter's diagnosis was quickly made. Every symptom pointed to opium poisoning. Realizing that the case was one of the utmost gravity, he sent for two associates. The usual remedies were applied. Artificial respiration was forced, black coffee, atropine, digitalis and oxygen

gas administered, the electric battery employed, all without effect, for on Sunday morning, at about eleven, the death occurred. Miss Day had discovered the pill-box bearing Harris's initials. The murderer was sent for, and arrived at about daybreak. "We have a frightful case here," said Dr. Fowler, "and there must have been some very great mistake; what have these capsules contained?" Harris replied that he had given them for malaria, headache and insomnia, that he had directed twenty-five grains of quinine and one of morphine, to be equally mixed and divided into six capsules, with a direction that one be taken at night.

"You had better go to McIntyre's immediately," the attending physician said, "and ascertain whether they have not reversed the proportions of the drugs. It is my belief that instead of four grains and a fraction of quinine they have put that amount of morphine."

Harris left the house, and returning shortly, announced that he had been to the druggist's and had been informed that the prescription was prepared in exact accordance with his directions. This was a lie, for he did not go to the pharmacy until later in the day.

Absolutely no evidence of affection appeared on the part of the cold-blooded villain while the doctors were engaged in their desperate struggle with death. A number of times he asked whether in their opinion he could be held responsible. This singular inquiry was repeated until Dr. Fowler savagely turned on him. "I don't want to discuss the question as to who is liable. I am trying to save this girl's life." At one time when Helen seemed to be getting a little better, "Well," he said, "whichever way this case turns out I don't see as I ought to blame myself." Again, he suggested tracheotomy, at which the physicians looked at him in astonishment. Even to the layman it is apparent that cutting into the trachea and inserting a tube (an operation only made where an obstruction exists and for the pur-

pose of allowing air free access to the lungs) was totally unnecessary, and would have inevitably resulted in the death of the patient.

Through the long night Harris said several times that he was somewhat interested in the girl, and that if she recovered he might possibly become engaged to her after his studies were finished. When she finally passed away, "My God," he exclaimed, "what will become of me?" On Miss Day's entering the room he said, "Oh, Miss Day, I'm so sorry for you." That was absolutely all. Dr. Fowler himself closed the tender eyes and arranged the flowing hair.

Under the circumstances of the case Mrs. Potts naturally desired to have the burial occur as soon as possible. Dreading the disclosure of Helen's widowhood, which an autopsy would have revealed, she stated to the coroner that her daughter had been a sufferer from heart disease, and that doubtless this was the cause of her death. That official thereupon permitted the body to be removed to Mt. Pleasant, N. J.

Suspicion, however, would not down. Great care was exercised by the coroner in the selection of his jury, which was partially composed of some of the most eminent members of the medical fraternity, among them Dr. Peabody, the murderer's instructor. Three of the leading druggists were also included. Testimony pointed to but one conclusion—death had resulted from morphine, administered by Harris.

On May 13, 1891, the grand jury found a true bill, and the uxoricide was brought to the bar in the January following. A full and dispassionate hearing was accorded, in the course of a trial which lasted three weeks. Hon. Frederick Smyth, Recorder, presided. The State, represented by Francis L. Wellman and Charles E. Simms, assistant district attorneys, marshaled the damning array of facts with relentless energy. Step by step their advance was fought by Messrs. Taylor, Jerome and Davison, counsel for the defence. The latter contented themselves with merely offering evidence sufficient to cast

doubt upon the diagnosis of the attending physicians as well as upon a post-mortem examination made by the State's experts. They contended that Miss Potts did not die of morphine poisoning but uræmia, and the medical testimony which they offered tended chiefly to show the extreme similarity between the two.

No useful purpose would be served by entering into a detailed statement of the expert evidence introduced beyond advertising to the fact that signs of morphine were found in the stomach and intestines. The importance of this can be appreciated when it is considered that quinine takes no longer to be resolved into the system. Had the pills, therefore, contained the ingredients called for by the prescription, the latter drug would have been present in quantity five times that of the former.

On February 2, 1892, after a deliberation of only an hour and twenty minutes, the jury declared Harris guilty of murder in the first degree. Motion for a new trial was denied.

An appeal was of course taken to the Court of Appeals, for the purpose of arguing which the noted criminal lawyer, William F. Howe, was retained. His contentions rested chiefly upon objections taken to the testimony of physicians who had at various times attended Helen Potts. It was argued that any information which they might have obtained as to her condition while attending her was confidential, and consequently privileged under the New York code. Evidence as to the Queen Drew episode as well as to the boasts which the prisoner had made was, it was asserted, improperly allowed. The general ground was also taken that the facts as presented did not justify a verdict of guilty. The highest tribunal, however, emphatically dissented from these arguments. The privileged communications rule is for the benefit of the patient so that he may have confidence in his physician. Surely it cannot be used as a buckler for a murderer. The Canandaigua affair as well as the statements of Harris was properly admitted in evidence, as bearing upon the question of motive and

to repel the strong presumption which would exist in favor of a husband on trial for the murder of his wife. Finally after an exceedingly careful review of the facts the court declared that it did not see how the jury could have brought in any other verdict.

Not discouraged, the defendant put forth redoubled efforts. Petitions were circulated, praying Governor Flower to appoint a commissioner to take what was claimed to be newly discovered evidence, on which to base an application for pardon. Many signatures were obtained. It should be noted that at this point Harris abandoned his contention that Helen Potts did not die of morphine, and took refuge in the plea that she was an habitual user, and that her death simply resulted from over-indulgence.

Desiring that every possible degree of leniency might be exercised the governor appointed Hon. George Raines to take testimony. Every nerve was strained by the criminal in an endeavor to prove his case, but all to no purpose, for after a hearing lasting many days the commissioner reported adversely. On May 4 Governor Flower announced his determination not to interfere with the course of justice.

On May 8, four days later, the murderer paid the penalty of his diabolical crime. More than a thousand persons stood on the hill in front of the prison watching for the black flag which would announce that justice had been done. Carlyle Harris met death with perfect *sang froid*, declaring his innocence to the last.

It is more than doubtful whether so extended an opportunity would have been accorded to Harris in which to establish his innocence had it not been for the devotion of his mother. With tireless energy she besieged reporter, court official and counsel. No task was too severe for her abiding love. Absolutely confident in her son's guiltlessness, nothing daunted her in the effort to obtain his freedom. She was the mainstay of the defence. As well as Helen was she the murderer's victim. They should share our pity.

Crime succeeds crime. It is rare, indeed, that a notorious piece of villany is accomplished without another strikingly similar following it. The Buchanan case was the sequel to the Harris murder.

Dr. Robert W. Buchanan was, in 1893, convicted of murdering his wife through the instrumentality of morphine. She was a woman of bad reputation, at one time the keeper of a disorderly house in Newark, N. J. In a moment of infatuation she deeded to him some valuable real estate as well as executed a will, chiefly in his favor. Soon dissensions arose and the pair became dissatisfied and wearied with each other. It had been purely a marriage for money on his part, and becoming ashamed of his wife he even denied its existence to his friends and companions. She, on the other hand, resented his neglect and dissipated conduct.

On April 21, 1892, immediately after breakfast, Mrs. Buchanan was taken violently ill. A physician was called, who diagnosed the case as one of hysteria and prescribed accordingly. At about three o'clock Dr. Buchanan was seen to give the patient a dose of two teaspoonfuls of medicine, although the prescription called for one only. She rapidly fell into a state of profound coma, which continued until the following afternoon, when death occurred. The case had been subsequently treated as one of cerebral apoplexy. A post-mortem examination, however, revealed no trace of this disease, though it did show the presence of morphine sufficient to indicate a dose of from four to five grains. The chemists also found traces of atropine.

Undoubtedly Dr. Buchanan had combined the two drugs. The cleverness of this is apparent when we consider their dissimilar effects. Morphine induces stupor, atropine delirium, followed by stupor. Morphine causes a contraction of the pupils of the eyes often to the size of pin points. Atropine greatly dilates them. Is it to be wondered that the attending physicians were confused?

It is doubtful, however, if the criminal would have been convicted had it not been for that propensity to talk, which the type almost invariably possesses. It was shown that time and again he had commented on the fact of "Carlyle Harris not understanding his business" and upon his "leaving a trace behind." The speaker invariably implied that he could do much better. When an investigation was talked of he even went so far as to say that his deceased wife was a morphine eater, and that morphine would be found in her body. In fact, to the student of criminology who desires to ascertain both how logical a sequence one crime may be of another and how absolutely a criminal can betray himself, no better illustration is afforded than the case of the People of the State of New York *v.* Robert W. Buchanan, as contained in Volume 145 of the New York Court of Appeals Reports.

It need only be added that a verdict of guilty was sustained by the appellate tribunal, and pupil followed master to the electric chair.

NOTE. — The author desires to express his acknowledgment of the courtesy of Hon. Charles E. Simms, ex-Assistant District Attorney of New York County and subsequently City Magistrate, to whom he is indebted for many of the facts in this article.



# The Green Bag.

---

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

---

Communications in regard to the contents of the Magazine should be addressed to the Editor,  
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

---

*The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.*

THE expected has happened, and a raft of bills dealing with anarchy and its doings has been introduced in Congress. They serve at least to point out both the necessity of some legislation and the difficulty of framing a safe and effective act. Picturesque suggestions, such as that of Senator Hoar of deporting anarchists to some distant island where they might live by themselves, unhampered by any form of government, add an unexpected touch of humor to an otherwise serious subject, but hardly help in the solution of the problem.

Some few things, however, seem clear. The Federal government, rather than the States, should punish crimes of violence against the President or other high Federal officers. The subject can be fully dealt with under Federal statutes, and it would be unwise to enlarge the constitutional definition of treason to include this class of crimes. The punishments should be swift and severe, but should avoid any unwise severity which would create sympathy for the criminals. Amendment of the immigration laws, with a view to shutting out foreign anarchists, would be desirable, if such restriction could be made effective, but, practically, little can be done in this line that would be effective. To define an anarchist presents serious legal difficulties; it is better, therefore, not to attempt to legislate against a class, but to specify certain acts as punishable. Abhorrent and full of danger as are the crimes laid at the door of anarchy, it is essential to remember, in framing repressive legislation, that any real abridgment of freedom of speech or of the press carries even more peril to our institutions. And at the present time, when so many of us find it easy to deny, at least to another people, the "inalienable rights" which lie at the foundation of our form

of government, it is more than ever important that our constitutional rights should be guarded jealously.

ONE of the sanest bills is that drawn by Hon. Edgar Aldrich, United States District Judge for New Hampshire and introduced in the Senate by Senator Gallinger, and entitled "a bill to protect the President, Vice-President, persons in the line of Presidential succession, and ambassadors and foreign ministers." (S. 1552, 57th Congress, 1st Session.) This bill provides the penalty of death in the following cases: for intentionally killing, or intentionally by word or print inciting others to kill and by such means causing others to kill, any of the persons above named; for assault with intent to kill upon the President, Vice-President, and persons in the line of Presidential succession; and for associating together or assembling for the purpose of discussing and considering means for killing any person charged with the duty of executing Federal laws, or any head of a foreign state, or any ambassador or minister of a foreign country resident in the United States. And it provides imprisonment in the following cases: for threatening to kill any of the persons named in the title of the bill, or for assault upon any ambassador or foreign minister, imprisonment for not exceeding thirty years; for expressly, openly and deliberately approving the intentional, violent and unlawful killing of any of such persons, imprisonment for not exceeding twenty years; and for openly and deliberately advocating the violent overthrow of all government and declaring against the enforcement of any and all law, imprisonment for not exceeding ten years.

In the main the provisions of this bill are excellent. It is well to accord to foreign ambassadors and ministers resident here the same protection that is, or should be, thrown about the President and those who are in the line of Presidential succession. Might it not also be

advisable to enlarge the terms of this bill to include all United States judges and all members of either House of Congress, and all persons appointed or elected to any of those offices?

With certain provisions of the bill, however, we cannot agree. Sections nine and ten, which impose the penalty of death upon "persons associating themselves together or assembling within any State or Territory for the purpose of discussing and considering means for killing any person charged with the duty of executing the Federal laws" or "for killing any chief or head of a foreign state or country, or any ambassador or minister of a foreign state or country resident in the United States," are too drastic. Such conspiracy should be punished; but the punishment should be imprisonment, unless indeed, such a conspiracy led directly to a killing or an assault with intent to kill, in which case such conspirators might be considered rightly as accessories, and should be punished with the same severity as the principals.

We doubt, also, the advisability of attempting, as in Sections seven and eight, to punish even express, open and deliberate approval of intentional, unlawful and violent killing of any of the officials named in this act. Such approval is so abhorrent to practically the whole body of the people that public opinion may be left to deal with such cases; and to consider the expression of such approval as "conduct calculated to incite unlawful violence" imputes to the act a quality which, except in rare instances, it would not in fact possess.

And we have even graver doubts concerning the last section of the bill, which provides that "any person who shall openly and deliberately advocate the violent overthrow of all government whatsoever, and who shall openly and deliberately declare himself against the enforcement of any and all law," shall be imprisoned. The wording seems too broad. To declare "against the enforcement of any and all law" is, by itself, an act coming well within the right of freedom of speech; and such declaration, even though coupled with the advocacy of "the violent overthrow of all government whatsoever," seems an idle vamping ill-calculated to lead to action, rather than—to quote the words of the bill—"a menace to the Federal laws and to the good order and well-being of civilization."

THE attention of the council of one of the eastern Bar Associations has been called recently to the acceptance by members of the legal profession, from a Title Insurance Company, of rebates of a certain percentage of its bills for services in the examination of any title received by it from such attorneys. It is clear that any practice by which an attorney allows a client to pay for services performed by some one other than the attorney himself, and then puts in his own pocket part of such fee without the knowledge of the client, is not in accordance with the right standard of professional duty. That standard imposes the nicest regard of the client's interests, and demands that the relations of the attorney to his client shall be absolutely open, and free from even the suspicion of sharp dealing or dishonesty. We cannot believe that such a practice as that referred to above is prevalent; but if it is prevalent or bids fair to become so, it would be well for Bar Associations to stamp it at once with strong official disapproval.

#### NOTES.

Two members of the same Bar circuit in England are Mr. Richard Eve and Mr. Adam Walker. When the former desired to become a Queen's Counsel, or to "take silk" as the expression is, he wrote, according to custom, to the Seniors on his circuit to see whether they had any objection to his application to the Lord Chancellor. Mr. Walker's reply to the letter was as follows:

*My Dear Eve:* You may take silk or a fig leaf. I don't care

ADAM.

(Eve took silk.)

COLONEL WEBSTER, the father of Daniel Webster, was a farmer; and his son's spare hours were spent in work upon the farm. Daniel's teacher remonstrated with him for coming to school with his hands in such a filthy condition, telling him that if this continued he would be punished.

The next day there was no improvement, and when summoned for punishment he was told that, if he could find one other hand in the whole school that looked as badly, he would be let go. "I can," was the quick response, as he held out his other one.

GOVERNOR LESLIE M. SHAW, of Iowa, is quick at repartee in his public addresses. Several times this ability has served him well. During the late political campaign Governor Shaw was addressing a meeting in Nebraska that was especially troublesome. A number of the long-whiskered populists were rather inclined to doubt the statements made by him on the gold and tariff questions. To make the situation more embarrassing, a half-drunken fellow in the back part of the room broke out several times and had to be quieted.

The Governor waited patiently his opportunity to get in a telling blow that would turn the laughter and ridicule against the offenders. Several times questions were asked and were answered by the speaker without any signs of irritation being shown. A man well down in front insisted on asking a question every five minutes on the average. He usually prefaced them by such remarks as "Just a minute, please," or "Let me interrupt for a minute." In an unhappy moment, however, he broke in with "Pardon me, but—." Before he could finish, the Governor, a rather self-satisfied look spreading over his face, replied: "Well, I've pardoned lots worse fellows than you in my time, and I presume it would be unjust to draw the line here."

A CELEBRATED lawyer in Nova Scotia, who writes under the *nom de plume* of Juvenis, is noted for his carelessness in dress, which fact annoys the members of the bar exceedingly. Entering the court room upon one occasion minus a necktie, the Judge reproved him, saying that the law required him to wear one. "Oh, yes, your Honor, I know it," was the ready answer, "but it does not say where to wear it." As he spoke he pulled it out of his trouser's pocket. The Court was too busy repressing a smile to allude further to the matter.

THE late Judge Thompson of Gloucester, Massachusetts, stammered badly. It chanced one day while on his way to attend Court in Salem, that the Judge had for a seat-mate a stranger. Entering into conversation, the Judge, who was a genial man, beguiled the time by telling stories. Not many days later when called to Salem again he met the same companion who

invited him to sit beside him, saying, "You are the gentleman who told such delightful stuttering stories."

WHEN the *ante mortem* epitaph composed for Lord Westbury by Mr. Wickens, which has been so often referred to, appeared in print, it naturally enough excited much attention among members of the bar, by whom Lord Westbury was respected for his learning, but not loved for his courtesy. The story goes that when James (always and only known as "fat James," for his bodily proportions were something more than ample) sailed majestically into Wood's Court, and with difficulty squeezed himself into his accustomed seat in the front row beside the sparse form of Mr. W. M. Gifford, Q.C., the first question of James to Gifford was, "Have you read the epitaph?"

"Yes, I have; it is inimitable. You must get Wickens to write yours for you, James."

"I wonder what he would have to say about me, Gifford."

"For my part, James, I have long ago thought of the most appropriate epitaph for you. Shall I tell you what I think it should be? 'Let my latter end be like his.'"

#### NEW LAW BOOKS.

THE LAW OF BANKRUPTCY. Including the National Bankruptcy Law of 1898, the Rules, Forms and Orders of the United States Supreme Court, the State Exemption Laws, the Act of 1867, with Citations to all relevant Decisions. Second Edition. By *Edwin C. Brandenburg, LL. M.* Chicago: Callaghan and Company. 1901. Law sheep (pp. liii + 988).

The second edition of Professor Brandenburg's *Law of Bankruptcy* differs essentially from the first edition. To interpret the present bankruptcy law by the light of actual decisions was, in the case of the first edition, impossible—for the simple reason that there were then no such decisions, except in so far as decisions under the Act of 1867 were applicable. Now, however, after the Law of 1898 has been in operation for three years, many of its provisions have been the subject of judicial interpretation; so that while in the first edition the decisions under the earlier act were cited at best



merely as a guide to the construction of the present law, the present edition contains many citations of decisions of Federal and State Courts bearing directly on the Bankruptcy Law of 1898.

Professor Brandenburg is to be especially commended for making his book a treatise on its particular subject rather than a mere digest, as is the case with so many text-books. His views on points not yet passed on by the courts are well considered and of practical value. An excellent feature of this volume is the accompanying of each section and subdivision of the present law with the parallel provision of the Act of 1867.

THE AMERICAN STATE REPORTS. Vol. 80. Containing Cases of General Value and Authority decided in the Courts of Last Resort. Selected, reported and annotated by *A. C. Freeman*. San Francisco: Brancroft-Whitney Company. 1901. Law sheep (pp. 1053).

One of the interesting cases reported and annotated in this present volume is *Blue v. Beach*, 155 Ind. 121, involving the powers of a Board of Health. The exact point in issue was whether, in time of danger of a smallpox epidemic, such Board may require that no unvaccinated child be allowed to attend public school during the continuance of such danger. Such power was upheld, even in the absence, as here, of any statute making vaccination compulsory or imposing it as a condition upon the privilege of children attending the public schools. The Court, however, carefully limited this power of exclusion to the period of danger of an epidemic. The excellent note following this case covers the broader question of what powers may be delegated to Boards of Health. Other valuable monographic notes in this same volume discuss, among other questions, powers of sale in wills, purchase by agent of property of principal, and replevin.

AN INDEX-DIGEST OF THE NEW YORK COURT OF APPEALS DECISIONS, 1847-1901. By *Colin P. Campbell, LL. M.* Albany, N. Y.: Matthew Bender. 1901. Law Sheep (pp. 1521).

THIS full and excellent one-line digest would seem to be a necessity for any one who has frequent occasion to look up points in New York law. It takes no little skill to state the points of

a decision both clearly and with the conciseness here demanded; but Mr. Campbell has accomplished this difficult task in a very acceptable manner. The cases digested include not only all of the reported decisions in the New York Reports, but also such memorandum cases as contain matter of general interest. From Abbott's Appeal Decisions, Keyes' New York Reports, Transcript Appeals, Selden's Notes, Howard's Cases, and Silvernail's Reports, some cases, omitted by the reporters from the regular series, have been digested.

PROBATE REPORTS ANNOTATED. Containing recent cases of general value decided in the Courts of the several States on points of Probate Law. By *George A. Clement*. Volume V. New York: Baker, Voorhis & Company, 1901. Law sheep. \$5.50, *net* (815 pp.).

This series of reports is a convenient collection of recent probate cases decided in various State courts. The present volume contains nearly one hundred cases, about one third of which are annotated. The notes, beginning as a rule with a concise general statement of the general principle involved, give a digest of cases bearing on the particular subject in question. The principal notes in the present volume treat of delusions, election by widow, declaration of testator as evidence, employment of attorney by executor or administrator, transactions between guardian and ward, laches, expense between life-tenant and remainder-men, inheritance tax, precatory trusts, transactions between trustee and *cestui que trust*, vesting, and effect of marriage on will.

TABULATED DIGEST OF THE DIVORCE LAWS OF THE UNITED STATES. Revised edition. Folding chart. By *Hugo Hirsh*. New York: Funk and Wagnalls Co. 1901. Cloth: \$1.50 *net*.

This ingenious publication gives in tabular form an excellent digest of the divorce laws of each of the States, grouping causes under fifteen general heads, and stating the provisions of the respective States as to remarriage, residence, practice and separation. It enables one to see at a glance the requirements or provisions on these points in any particular jurisdiction, and to compare the legislation of different States.





*Rufus Harrison*

# The Green Bag.

VOL. XIV. No. 2.

BOSTON.

FEBRUARY, 1902.

## BENJAMIN HARRISON AS A LAWYER AND AN ORATOR.

By W. W. THORNTON.

**A**BILITY as a lawyer and ability as an orator are not necessarily linked together; but happy is the man who possesses them both, even to a limited extent. Benjamin Harrison in this respect was greatly favored by nature.

General Harrison was not born of a race of lawyers; his parental ancestors were land proprietors and office-holders. His great-grandfather, after whom he was named, was a Virginia planter, a signer of the Declaration of Independence, and was three times elected Governor of his native State, two of which he served, dying before the third began. His grandfather was a physician, a farmer, a successful Indian fighter, and an office-holder. As the battle of New Orleans, posthumous to the treaty of peace, made Andrew Jackson President of the United States, so likewise did the Battle of Tippecanoe make William Henry Harrison President. But the grandfather of Benjamin was a legislator, and for years the Governor of the Territory of Indiana; Benjamin's father, John Scott Harrison, served two years in Congress;—so that young Harrison, when he decided to enter upon the career of a lawyer, was probably influenced in a measure by the careers of his three immediate ancestors.

Benjamin Harrison was born in his distinguished grandfather's farm-house at North Bend, on the north bank of the Ohio river, about twenty miles below Cincinnati, August 20, 1833. He attended a country school; then Farmer's College, at College Hill, now a suburb of Cincinnati; and at the age of eighteen graduated fourth in a class

of sixteen from Miami University, located at Oxford, Ohio. Of the members of this class, eight became ministers of the Gospel; six, lawyers; and one, a physician; leaving only a single member who did not enter a professional career.

Young Harrison, as soon as he had finished his college career, entered the law office of Stover and Gwynne, of Cincinnati, famous lawyers in their day. In March, 1854, he left Cincinnati, having married when two months over twenty years of age, and located in Indianapolis. At that time a provision of the State Constitution forbade the admission of a minor to the bar; but that alone does not seem to have prevented his entering upon his career as a lawyer. His impediment to enter upon that career was a lack of clients. By some means he had become the owner of a lot in Cincinnati, which he sold for eight hundred dollars before his removal to the State of his choice; and this was his sole possession of worldly goods and effects. He knew, on his arrival, but one person in Indianapolis, and that was the Clerk of the United States District Court, who kindly gave him a desk in his office, with the privilege of hanging out at the door his shingle as a lawyer. Shortly after, he was appointed crier of the United States Court, at two dollars and a half a day; and it was in this way that he first earned money in his new home. In after years he often referred to this incident, and stated with what great satisfaction he received it, and thus added to his fast shrinking purse.

General Lew Wallace, who met him at this

period of his career for the first time, thus describes him: "He was small in stature, of slender physique, and what might be called a blonde. His eyes were gray tinged with blue, his hair light, reminding one of what, in ancient days along the Wabash, was more truly than poetically described as a 'tow-head'. He was plainly dressed, and, in that respect, gave tokens of indifference to the canons of fashion. He was modest in manner, even diffident; but he had a pleasant voice and look; and did not lack for words to express himself. At first one wondered that a young man, apparently so lacking in assertion, should intrust himself so far from home."

Harrison came to Indiana at a fortunate period of time. The present Constitution had gone into force November 1, 1851. Its provisions required a complete reformation of civil and criminal pleading and practice; and both the civil and criminal codes, with many other laws of a reformatory character, had gone into force May 6, 1853, with the publication of the Revised Statutes bearing date of the year previous. He, therefore, stood on a nearer equality with the older members of the bar than would otherwise have been the case.

His first case was a State prosecution in the Circuit Court for burglary. Jonathan W. Gordon, who afterwards rose high in his profession, was the prosecuting attorney; and he invited Harrison to assist him. Horace Mann was to lecture in the evening, and Gordon desired to hear him. Those were the days when court was often held in the evening; and Gordon, thinking the case would occupy the evening, invited his young friend into the case, with a view of having him make the closing argument after night, while he could thus secure an opportunity to attend the lecture. . Harrison, as young lawyers are wont to do, made copious notes, but when he arose to speak, to his dismay he found he could not read them, for lack of light. Throwing them aside, he trusted to

his memory, and to his surprise found that he could recollect the evidence far better than he supposed. That night in the dimly lighted old court room he won his first case. So good an impression did he make, that the leading counsel for defendant soon invited him to become his partner, and the partnership continued until the senior member, Mr. Wallace, became clerk in the Circuit Court in 1860.

Mr. Harrison soon became interested in politics, joining his fortunes with the newly founded and rising Republican party. In 1855, at a small village of the county, he made his first political speech. In the campaigns of 1856 and 1858 he took an active part as a speaker, with such success that in 1860 he was nominated and elected Reporter of the Supreme Court of his State.

It was during the campaign of 1860 that he first met Thomas A. Hendricks, afterwards for years his political and legal antagonist. It chanced that Mr. Hendricks and he were to speak at the same place at same hour. The former was pitted against the Republican candidate for governor as the fittest man in the State to take care of the Democratic side of the political contest, and was the Democratic candidate for the gubernatorial office. As soon as Mr. Harrison arrived at the town where he was to speak, a demand was made by the Democrats for a joint debate. The Republicans hesitated, but finally demanded of Mr. Harrison that he go into the debate. He hesitated, declaring it unfair to demand of the candidate on the tail of the ticket to debate with the one at the head; but he finally consented to do so. It was arranged, however, that Mr. Hendricks should speak two hours, and then Mr. Harrison so long as he chose to do so, thus avoiding technically a joint debate.

Mr. Hendricks used up his time with one of those adroit and pleasing addresses, in a style in which few if any one could equal him. In closing, he courteously requested the audience to remain and hear Mr. Harrison.

Beginning in a timid manner, for he was a stranger in the place, and knew not whether or no many of his Republican friends were present, an opportunity was soon given Harrison to give a retort to a remark of Mr. Voorhees (afterward United States Senator from Indiana), who had been so indiscreet as to arise and contradict a statement he had made, that carried the house with him. He then proceeded to so effectually answer the argument of Mr. Hendricks, that at the conclusion of his speech, Mr. Voorhees arose and announced that in the evening he would answer the speech of Mr. Harrison. The report of Mr. Harrison's speech crept over the State, and he was thereafter in constant demand.

It was in the Reporter's office that he did his hardest work, and added to a stock of legal information already large. In 1862 he went into the volunteer service of the army as colonel. The Democrats insisted that he had abandoned his office, and at the fall election elected a successor to him; and upon proper proceedings brought, the Supreme Court decided that the newly-elected Democrat was entitled to the office. In 1864 Mr. Harrison was re-elected Reporter, although then in the field at the front, this time holding the office four years, the full term.

Mr. Harrison edited ten volumes of the Reports of the Supreme Court of Indiana, and in many respects the editing is admirable. His *syllabi* are unusually accurate and clear, free from verbiage and redundancy.

During the war a treasonable, secret organization existed in Indiana and adjoining States, known as the Knights of the Golden Circle, or Sons of Liberty. Its membership extended into the thousands, and its object was to aid the South in its attempt to dismember the Union, or, if the opportunity offered, to form a new confederation of the Northwest. Its ringleaders in Indiana were arrested and tried by a military court-martial. All who participated as judges acted under orders from a superior officer to pro-

ceed with the trial. Several were convicted of treason and sentenced to death. On *habeas corpus* proceedings they were all released by the United States Supreme Court, on the ground that, as Indiana was not the seat of war, the military commission had no jurisdiction to try the charge of treason.

Soon afterwards one of the individuals who had been tried brought suit for damages against all the judges of the military commission, which was tried at Indianapolis in the Federal Courts; and Mr. Harrison was appointed by President Grant to defend the case, the government considering that it had such an interest in the defense of those who had acted under its orders as to justify it in defending those from whom the damages were claimed. Mr. Hendricks was leading counsel for the plaintiff. Naturally, the case excited great interest; for it was an echo of the War of the Rebellion. Under the rulings of the Supreme Court the defense was limited to a mitigation of the damages; and so successfully did Mr. Harrison conduct the defense, occupying many days, that the plaintiff recovered only nominal damages. The plea for mitigation of damages rested upon the treasonable acts of the plaintiff and his associates.

The address of Mr. Harrison was a masterly effort. The plaintiff's treasonable conduct was held up unmercifully before the jury. Harrison spoke from his heart. Every sentence rang with loyalty or denunciation for the plaintiff.

"Senator Hendricks," said the speaker, "will have a great deal to say to you about the security which the Constitution guarantees to life, person, and property. It is indeed a grand birthright that our fathers have given us; but, gentlemen, it was a legacy handed down to the loyal and law-abiding. The law covers with its broad and impenetrable shield the true-hearted citizen, not the traitor and the law-breaker. Yet the gentleman comes to make appeals from a Constitution, which his client would have de-

stroyed, and in behalf of a liberty which would have been exercised for the destruction of our government. He complains of a restraint which was in the public interests of public peace. Listen to him, then, give your full accord to all he may say of the right of the citizen to be secured in person and property, but remember—those guarantees are to the loyal-hearted and law-abiding. . . . It was a common thing for the rebels to clothe themselves in the garb of our soldiers, the better to destroy them with perfidious fire; just so this man wraps the provisions of the Constitution around him, that he may steal forth in due time in his work of death. We never can be proud enough of the security we enjoy, but let us never forget that it was not made to be for the protection of traitors.”

In 1878 General Harrison was again pitted against Mr. Hendricks in a celebrated case of a conspiracy against the United States election laws in Jennings County. He appeared for the Government, while Mr. Hendricks appeared for the defendant. The case was tried before Judge Walter Q. Gresham, afterwards Mr. Cleveland's Secretary of State, in the Federal Court. The accused was a prominent and wealthy citizen of the State, who spent a fortune in his defense, the court costs alone adjudged against him amounting to over thirty thousand dollars. The case was in a great measure won by the close and excellent cross-examination of the defendant by Mr. Harrison. Counsel for the defense placed the defendant on the witness stand and permitted him to testify that he had not committed the crime charged against him. This opened up a field for almost unlimited cross-examination. Bit by bit Mr. Harrison drew out evidence of his guilt, until he stood an unwilling witness against himself, and practically admitted the charge in the indictment.

In this case from Jennings County, ex-Governor Hendricks asked the court to discharge the jury panel, and to call a jury composed of six Republicans and six Demo-

crats to try the case. In an unguarded moment General Harrison opposed the motion, saying to the Court it had no power to discharge the present panel and call a new one thus composed. Judge Gresham answered him by saying: “Whether or not the Court has the power, it is going to do it. I do not propose, if the defendant be convicted, that it can be said it was done by a partisan jury.” The motion for a new jury-panel prevailed.

In 1887 Mr. Harrison's term as Senator expired. He was a candidate for re-election. In 1885 the Lieutenant-Governor had resigned. Both the leading parties in 1886 nominated candidates to fill the vacancy thus occasioned. The Republicans were successful at the polls; but when the State Senate met the following January, the Democrats raised the question that the vacancy could not be filled until 1888, and that in the meantime the president *pro tempore* of the Senate would act as Lieutenant-Governor. A contest arose that shook the State to its foundations; for on a decision in favor of the newly elected Lieutenant-Governor, the question of the election of a United States Senator largely depended.

The question found its way into the courts on a *quo warranto* proceeding; and General Harrison appeared in the Supreme Court as counsel in chief for the newly-elected official. Judge David Turpie, afterwards United States Senator for twelve years, appeared for the other side, a very forcible man in a legal argument. Harrison's argument is a model of legal reasoning. Up to that time it was, perhaps, his greatest judicial argument. One of the judges before whom he appeared once said to the writer that it was the greatest legal argument he ever heard. Again and again was he plied with questions by the judges of the Court, and not once did he evade a question, nor was he at any time put *hors de combat*. He won the case, the Court holding it had no jurisdiction.

In the Senate Mr. Harrison's oratory did not attract the attention it did in after years;

perhaps, like the oratory of so many of the Senators, it was so buried in the Congressional Record that it was not resurrected from that tomb of oblivion.

In the latter part of 1887 and the early part of 1888, Mr. Harrison was regarded as a probable candidate for the Presidency. He was invited to make a number of speeches before political clubs, and among the clubs he addressed were the Michigan Club of Detroit, and the Marquette Club of Chicago. The speeches he delivered before these two clubs are models of political oratory; both the speeches teem with denunciation of frauds upon the ballot.

After his nomination many delegations of citizens visited him. Following the example of Mr. Garfield, and in a measure that of Mr. Blaine, General Harrison began a series of short addresses that extended through the entire campaign, and numbered ninety-four in all. Not once did he trip; and many of his sentences were rallying cries for his party. To a delegation from California, he said: "I feel sure too, my fellow citizens, that we have joined now a contest of great principles, and that the armies which are to fight out this great contest before the American people will encamp upon the high plains of principle, and not in the low swamps of personal defamation or detraction." To his own neighbors, who assembled to congratulate him upon his nomination: "Kings sometimes bestow decorations upon those whom they desire to honor, but that man is most highly decorated who has the affectionate regard of his neighbors and friends." Speaking of the disbanding of the army at the close of the Civil War: "And so that great army, that had rallied for the defense and preservation of the country, was disbanded without tumult or riot or any public disturbance. It had covered the country with the mantle of its protection when it needed it, as the snows of spring cover the early vegetation; and when the warm sun of peace shone upon it, it disappeared as the snow sinks into the earth,

to refresh and vivify the summer growth." Speaking before the Republican State Convention at Indianapolis of the death of General Sheridan: "To-day we mourn our hero dead. You call him then a favorite child of victory, and such he was. He was one of those great commanders, who upon the field of battle towered a very god of war. He was one of those earnest fighters for his country, who did not at the end of his first day's fight contemplate rest and recuperation for his own command. He rested and refreshed his command with the wine of victory, and found recuperation in the dispersion of the enemy that confronted him. This gallant son of Ireland and America has written a chapter in the art of war that will not fail to instruct and develop, when the exigencies may come again, others, who shall repeat in defense of our flag his glorious achievements."

To a delegation of railway employees: "Heroism has been found at the throttle and brake, as well as upon the battlefield, and as well worthy of song and marble. The trainman, crushed between the platforms, who used his last breath, not for prayer or messages of love, but to say to the panic-stricken gathered around him, 'Put out the red light for the other train,' inscribed his name very high on the shaft where the names of the faithful and brave are written."

To a delegation of coal-miners: "I do not now care to deal with statistics. One fact is enough for me. The tide of immigration from all European countries has been and is toward our shores. The gates of Castle Garden swing inward; they do not swing outward to any American labor seeking a better country than this."

Speaking to a delegation of veterans on the War of the Rebellion: "It seemed as if the frown of God was on our cause. It was then, in the hour of stress, that you pledged your hearts and lives to the country, in the sober realization that the war was a desperate one in which thousands were to die. We



are glad that God has spared us to see the magnificent development and increase in strength and honor which has come to us as a nation, and in the glory that has been woven into the flag we love. We are glad that with most of us the struggle in life has not left us defeated, if it has not crowned us with the highest success. We, as veterans and yet citizens, pledged, each according to his own conscience and thought, to do that which would best promote the glory of the country, and best conserve and set in our public measure those patriotic thoughts and purposes that took us into war."

In an address on Abraham Lincoln, delivered after Mr. Harrison's retirement from office, he said: "It does not seem to be God's way to give men preparation and fitness, and to reveal them, until the hour strikes. Men must rise to the situation. The storage batteries that are to furnish the energy for these great occasions God does not connect until the occasion comes." In his last public speech: "Royal prerogatives are plants that require a walled garden, and to be defended from the wild, free growths that crowd and climb upon them." On Equality of Taxation: "Equality is the golden thread that runs all through the fabric of our civil institutions. The dominating note is the swelling symphony of liberty. The favoritisms and class distinctions which characterized the governments and administrations of Europe were destroyed with the establishment of government under the American constitution. At the polls, before the courts, in all assemblies, in all legislation, there was to be, not a class peerage, but a universal peerage. And as a corollary, necessary and imperative, to this doctrine of an equality of rights, is the doctrine of a proportionate and ratable contribution to the costs of administering the government. Indeed, this principle of a proportionate burden might be more properly called an inherent part of the doctrine of equal rights. For one whose right to acquire

and accumulate is disproportionately burdened, is denied equal rights. If a favored class may not be created, neither may any class be discriminated against. . . . Imposition and grace, in a free republican state, must be without discrimination."

In April, 1891, Mr. Harrison began his memorable journey to Texas and the Pacific Coast. In thirty days he traveled ten thousand miles, and delivered one hundred and forty speeches, many of them models of their kind, and many of them containing beautiful sentences. The striking thing about these speeches, and this is much more so of his ninety-four campaign speeches, is the lack of repetition. General Harrison seldom repeated: he had the ability to avoid it. Speeches delivered at the tail-end of a railroad train are apt to contain many repetitions, in fact, often are mere repetitions; but the speeches delivered by General Harrison on such occasions are singularly free from this vice. The writer recalls two days he spent in his company on a railroad train drawn through Indiana to enable Mr. Harrison to deliver political campaign speeches; and during that time there were no marked repetitions in the many speeches he made.

After his retirement from office, Mr. Harrison, unlike former ex-Presidents, took an active part in political campaigns. That was especially true of 1894, 1896, and 1898. He also delivered a course of six lectures in 1894 at Stanford University, on the "National Constitution," that are models of their kind. These lectures are not of a technical character: they were delivered to students not engaged in a professional study of law. "My aim," said he, in his opening lecture, "is not so much to make lawyers as to promote a broad and intelligent American citizenship. Our civil institutions are safe only while in the keeping of a generation that loves them; and the love of institutions, however it may be with another sort—must be educated. We guard and keep our treasures—that which is not valued we suffer others to take

without resistance." Six lectures of the series were delivered, but their termination is quite abrupt, apparently leaving the course incomplete.

In 1897 Mr. Harrison delivered an address before the students of Michigan University on "Some Hindrances to Law Reforms", and the next year before the Union League Club of Chicago on "The Obligations of Wealth." These are kindred subjects. For clearness and dignity of statement concerning some of the evils existing to-day, the reader will search long before he finds its equal. His two most noted political addresses, after his retirement from the Presidency, were delivered in 1894 and 1896 at Carnegie Hall, New York City. It was considered, at the times they were delivered, that they were the two most forcible speeches of the two campaigns. These two speeches are probably no more forcible than many others he delivered during these two campaigns; but the place of their delivery has given them more notoriety than the others. They are models of political oratory. In them is no brutality, for to that Mr. Harrison never resorted. There is some sarcasm, but more wit, not, however, of the boisterous kind. They are singularly devoid of statistics. In his speeches he used few statistics; he seemed to always bear in mind that few people can or will recollect figures, while they will readily retain a pungent or epigrammatic sentence. The student of political oratory will do well to study them.<sup>1</sup>

In 1900 Mr. Harrison was a delegate to the Ecumenical Missionary Conference, held in Carnegie Hall, and delivered several addresses before that body, which showed him in a new light as an orator. At the time they attracted much attention, and it is no assumption to say that these addresses gave much more prominence to the conference

<sup>1</sup> The Bowen-Merrill Company, Indianapolis, Indiana, has published in a volume entitled, "Views of an Ex-President," a number of speeches and papers by General Harrison, delivered or written since he retired from office.

than it otherwise would have had. Aside from an ex-President taking an active part in such a conference, his speeches attracted almost universal attention, by reason of their clearness of statement and forcible style.

After his retirement from office, Mr. Harrison resumed the active practice of law. He appeared in both the *nisi prius* and appellate courts;—not often, however, in the State *nisi prius* courts. It was impossible for him to attend to all the business that came to him; he was compelled to pick out such as was to his liking, and turn the remainder away. Perhaps his most notable legal argument was in the Illinois Inheritance Tax cases, in the United States Supreme Court, although it was in fact not better than others he delivered.

In 1899 Mr. Harrison went to Paris as chief counsel for the Venezuelan Government in the arbitration between it and England. His oral argument before that tribunal was considered by competent judges to be far superior to that of Sir Richard Webster, the Attorney-General and chief counsel of England. It extended through several days. The result was a drawn battle, as measured by the verdict of the arbitrators. But it is very well understood that the Russian arbitrator practically determined the result; for the two American arbitrators were for sustaining the contention of Venezuela, and the British that of England. The right was clearly with the former. What subtle and underground influence brought about the result is not discernable, but it was undoubtedly there.

After his return from the War of the Rebellion, with whatever case he was connected, General Harrison was in fact leading counsel, although not always so in name. One of his partners, now dead, has said of him: "While not always the senior in years, he was the senior in fact in every firm of which he was a member; such is the ungrudging testimony of all those who have been his partners."

One of the great secrets of Mr. Harrison's success as a lawyer was his thorough preparation. While a "ready man," yet he never trusted to his "readiness," except when compelled to by lack of opportunity to examine and prepare for the case. His habit was to really cross-examine his own client in his own office before the trial, to search his knowledge of the transaction to be tried "fore and aft," and then "across decks." Rigid analysis was one of his greatest holds on a case; and when he had ascertained all the facts as near as he could, he usually was able to determine the turning point in the cause and to call for an "authority" upon it to fortify himself. His statements of the case to the jury and the Court were terse and concise, putting before them clearly his theory in the case. His briefs in the Appellate Court were models of terseness and perspicuity. On paper he was as happy in making his point as in oral argument.

In his demeanor toward the Court and either associate or opposing counsel, he was always courteous. He wasted no words in meaningless compliments; but he was never harsh, and he never "bullied."

In the examination of witnesses General Harrison was remarkably happy in extracting the facts. His forte was cross-examination. Few equalled him; none excelled him. Towards a witness he was always fair and courteous; he never brow-beat, and was always careful to state a witness's testimony as he gave it. Bit by bit he extracted the facts, until all were secured, often without the witness being fully conscious of the revelation he had made. No lying witness escaped him. If a witness was lying, it was often General Harrison's practice to get him to commit himself upon a point, and then draw his attention away from it until he had secured his committal to a statement on the same point in direct contradiction of his first one; then calling his attention to his contradictory statements, he would ask him which of the two contained the truth. He would

then quietly wait until the witness had given his answer, or declined to do it; but the effect was crushing; it demolished the witness's testimony. Of course such a course is dangerous if there is any chance for the witness to harmonize his two conflicting statements; and it was here that Mr. Harrison's superior ability as a lawyer was manifested, in selecting statements of the witness that could not be made to harmonize with each other or with the uncontradicted facts.

In examining a witness General Harrison had that rare faculty to know when to quit. He seldom caught a tartar. In one case an elderly and irascible lady witness came to the stand. She was a very "willing" witness, and testified volubly and extravagantly. When passed over to General Harrison for cross-examination, there was a look of triumph in her eyes. She squared herself for a bout, when he said,

"You may stand aside, madam."

"Oh, I have heard of you; you can cross-question me as much as you please; I am not afraid of you," she said.

"I have no questions to ask you, madam," was his bland reply; and she was finished.

"General Harrison," once said an ex-Attorney-General of Indiana to the writer, "was the only man I ever was associated with in the trial of a case whom I felt would not permit anything to escape or get away from us. When associated with him I always felt that everything would be said and done that could be said or done to win a case. He forgot nothing." And this is the testimony of all who have been associated with him.

This was true of his arguments both to the Court and the jury. He was like a great fire sweeping over the prairie,—he carried everything before him, he swept the field clear. "It was the rule in our firm," said one of his partners in 1888, "when we were for the defense, to make General Harrison close for our side. If he made the first speech, we were like Riley's old father in the poem,

'Nothin' to say.' That is literally true. More than once, when some other pressing duty was calling him, he would be allowed to make the first speech; and it was amusing to see Porter [one of his partners], as he proceeded. He would strike out from his notes one thing after another until Harrison had finished. Then, when he was done, we would put our heads together and wisely conclude to let the case go with one speech from our side. He was a merciless reaper; nothing, absolutely nothing was left for the most careful gleaner. Porter<sup>1</sup> will bear me out in this." This is the testimony of all who knew him in his practice.

Previous to his election as President, General Harrison's practice was a general one; he tried all kinds of cases, except patent cases, and investigated all kinds of legal questions. Such a practice broadens a lawyer, while a special practice renders him narrow. Previous to 1884, Indiana was the home of many noted and great lawyers:—ex-Governor Thomas A. Hendricks, A. W. Hendricks, ex-Governor Baker, Senator Joseph McDonald, John W. Butler, Cyrus C. Hines, Governor A. G. Porter, William P. Fishback, ex-Senator David Turpie, ex-Senator Daniel D. Pratt, William Z. Stuart, John R. Coffroth, and Jonathan Gordon,—but he was easily the peer of any of them, and perhaps excelled any of them in ability as a lawyer. He despatched business easily, readily, and with celerity. His ability in this was always a source of surprise to his associates and partners.

"In my experience of thirty-two years,"

<sup>1</sup> Albert G. Porter, Governor of Indiana, 1881–1885.

said one of his old partners in 1888, "I have never seen a man in whose hands I would be more willing to place my imperilled life or fortune than in his. I have heard some men say that he is over-rated; but they are generally those who have never grappled with him in a hard fight. No lawyer who ever met him before Court or jury will talk that way." Perhaps no lawyer in the West excelled him.

As an orator Mr. Harrison ranks high, but not with Clay, or Webster, or Patrick Henry, or Ingersoll. He had a penetrating voice, not always pleasant; but one that carried a long distance. He spoke with little apparent effort. On his legs he was a good thinker, and had a fine command of language. He had a "telling way" of "putting things" that carried his thought to the most witless members of his audience. His speeches are sprinkled with gems of thought, and are filled with epigrammatic sentences. His powers of condensation were very great; and his speeches abound with no superfluous words. While he was a ready speaker, and was not at a loss for ideas on almost any topic brought forth for discussion, yet his speeches were the result of careful thought and study. He did not exactly commit to memory such speeches, but it was frequently his practice to dictate their substance to his stenographer, often whole passages of which were afterwards delivered verbatim when on the rostrum. All who ever attentively heard him in a speech of any length upon a serious subject could not help believing that he was a man of great resources and intellectual strength.



## WAS SHAKESPEARE BOUND TO AN ATTORNEY?

By J. B. MACKENZIE.

**I**N view of the unmeasured knowledge of things pertaining to each of the learned departments of human activity,—to leave out of account his equally familiar acquaintance with the situation and concerns of those following the humbler vocations of life—that was absorbed by the receptive mind of the great dramatist, and is graven with such power and skill on the pages of his deathless creations, it may be set down by many as both idle and whimsical to select for intimate examination the subject of his facile grasp of legal principles—principles helped notably in their submission, as they are, by a garbing of just legal nomenclature. Propositions germane to the realm in question are, however, advanced by him with so true an apprehension, and reasoning to enforce them is impressed by so rare a cogency; and illustrations are employed with such peculiar aptness (not to mention his fruitful tillage of the dry wastes of procedure), that to allow the claim suggested would hardly pledge the judgment to any violent presumption.

The writer, obliged to be honest, approaches his theme by confessing himself the proclaimer of no original gospel. Were a patent, indeed, sought for his theory, want of novelty would clearly stand in the way of its issue. And, in no small degree, because one danger of remaining neutral in a controversy is the turning out of a colorless product, he conceives that he should array his forces on one side or the other.

Malone, a studious commentator (himself a wearer of the long-robe), maintains the affirmative of the question as something incapable of being disputed; while Payne Collier, another fraternizer, in spirit, with the bard, who—ranked, also, with the profession—informs the debate by large acu-

men (both, it may be remarked, securing a guarded approver of their contention in Lord Chief Justice Campbell) unreservedly endorses the opinion of his fellow-student. Of those engaging with the problem in this country, Heard and Davis champion the same view. Not a few, it must be granted, (amongst them Lee and Knight in England, and Allen in America) gainsay the belief altogether. Most authorities, nevertheless, uniting to dismiss, in short order, the notion, favored by some, that our English monarch of song adopted in early life his father's calling of glover or wool-stapler—it has to be kept in mind that his occupation of much of this interval is wrapped in obscurity—concede a reasonable foundation on which to rest the hypothesis launched. For the widely-indulged surmise, at all events, that Shakespeare's understanding of law should be referred to a medium offering a better guaranty of its soundness and extent than a number of chance accretions, expanding some meagre nucleus of self-acquired information—a string of odds-and-ends laid hold of in fitful intercourse with practitioners—ore from the mine of lofty discussion, profound soliloquy uncovered by the deeper gleams from the phosphorescent wave of free-tongued levity, sportive banter shining about the lighter dramas; these—coupled with jets from the fount of glowing sentiment, irised fantasy which plays through the sonnets—yield unequivocal support.

There will be an effort, in dealing with the speculation, to present as logical a factum as possible.

Regard, by way of initial showing, this example of demonstrating the intent as that which, in the criminal sphere, determines the color of an act. Henry V., pursuing, while disguised, an argument with a soldier of his

army, holds forth in this wise: "So, if a son that is by his father sent about merchandise, do sinfully miscarry upon the sea, the imputation of his wickedness, by your rule, should be imposed upon his father that sent him. . . . But this is not so: for they purpose not their death, when they purpose their services." Here is a statement the propriety of which a lecturer on criminal law might envy.

From the cluster of pleasing jumbles which comprise the action of "The Comedy of Errors" may be detached an episode which, though bringing to light a somewhat high-handed creed of jurisprudence (evolved by the playwright, no doubt, to infuse greater spice into the adventure) justifies as thoroughly perhaps as any excursion by the poet into this mazy region the estimate ventured. Angelo, the goldsmith, had, pursuant to order, manufactured a costly chain for Antipholus of Ephesus; but meeting, soon afterwards, that person's twin brother and double, Antipholus of Syracuse, and mistaking him for the vendee of the chattel, delivery of it is then and there made to him; notwithstanding his stout repudiation of liability in respect of its purchase—his bluntly-avowed disbelief in his right to its possession. Falling in, at a later period, with his real customer, the merchant craves immediate satisfaction of his debt; pleading, as excuse for the uncivil demand, that he was himself undergoing pressure from one of his own creditors. The guiltless object of the misconception is, for the moment, petrified by the goldsmith's plausible account of his receipt of the ornament—such falling upon him like a bolt from a clear sky; but, ere long asserting himself, repels, with natural heat, the imputation that he had personally acquired it at any time. After a passing exercise with the rackets of contention, Angelo causes the protester's arrest by a constable, whom he had brought with him; the victim, as he is carried off, breathing out promises of fire and slaughter to requite his oppressor. The taking into custody, it may be interpo-

lated, has been looked upon as in the nature of mesne process, aiding recovery of a claim preferred. The servant of the outraged seignor, hurrying with news of the calamity to his master's wife, reports that her unlucky spouse has been "arrested on the case." Before manual coercion was practised, the trader had given his captive amiable warning of his design; brushing the pool of negotiation with a taking fly, "either consent to pay this sum for me, or I attach you by this officer."

The position obtains no less powerful advocacy from a turn which the under-plot in the second part of "Henry IV." assumes. Falstaff, it seems, had placed himself under obligation to Mistress Quickly, the hostess of an Eastcheap inn—his indebtedness accruing, not merely in respect of the *liquid* and *liquidated* item, potations consumed in the hostelry, but with reference to a graver, less materialistic source—breach of promise of marriage. What the dame thereupon imparts, in her weighty consultation with the officer of justice, to whom, in this unsettling hour, she has recourse, unveils the far from auspicious complexion of affairs.

Hostess: "Master Fang, have you entered the action?" Fang: "It is entered." Host: "Where's your yeoman? Is it a lusty yeoman? Will he stand to it?" Fang, (to his boy): "Sirrah, where's Snare?" Host: "O Lord! ay: good Master Snare." Snare: "Here, here." Fang: "Snare, we must arrest Sir John Falstaff." Host: "Ay, good Master Snare, I have *entered* him and all." Anon, the lady further unbosoms herself: "I pray ye, since my action is entered, and my case so openly known to the world, let him be brought to his answer." The behemoth's person having been secured without difficulty, through an opportune meeting with him on a public thoroughfare, the profligate—a brisk interchange of acerbities between the wronged Chloe and her deluder first occurring,—essays to force her into an unfair settlement. Little headway being made, however, upon

this tack, he, going about, exerts cajolery; freshening their interview, towards its close, with the cavalier behest, "Go, wash thy face, and draw" (withdraw) "thy action." It is gratifying to know that, while her *affaire de coeur* with Falstaff miscarried, the matron—who must have been a destructive siren, for Nym, too, succumbed to her enticements,—lived to console herself with the affections of Pistol.

As manifest countenance of the persuasion may be gathered from material in the 46th sonnet. Our subject's muse, having announced that the "eye and heart are at mortal war," and that each adversary has submitted the grounds on which he relies, thus dilates:

"But the defendant doth that plea deny,  
And says in him thy fair appearance lies,  
To 'cide this title is impanellèd  
A quest of thoughts, all tenants to the heart,  
And by their verdict is determinèd  
The clear eye's moiety, and the dear heart's part;  
As thus, mine eye's due is thine outward part,  
And my heart's right thine inward love of heart."

While the fraternity must agree that the lyricist has, through the likeness chosen, faithfully sketched the routine of a trial by jury, it will be seen that the array in this proceeding might be challenged for favor by the defendant, as being under the plaintiff's thumb—tenants of the heart. It may be doubted, likewise, whether, according to the practice, relief is apportionable in the manner sanctioned. A figure introduced by another sonnet, the 35th, corroborates the last witness:

"For to thy sensual fault I bring in sense,  
(Thy adverse party is thy advocate.)  
And 'gainst myself a lawful plea commence."

Let unbelievers hear the parting salute from that detonating salvo, through which Parolles—chief of braggarts, nonpareil among cravens—in "All's Well That Ends Well," lets loose his venomous abuse of Captain Dumain, before a group, as he wrongly fancies, of that officer's enemies. "Sir, for a *quart d'écu*, he will sell the fee simple of his salvation, the inheritance of it; and cut the entail from all remainders, and a perpetual succession for it perpetually." Parolles, being displayed in the comedy as an ill-regulated, frothy speaker, a goodly measure of rhodomontade enters into his tirade. Yet brayed with it in the mortar is quite enough sane instruction to render likely the possession of a quantum of juridical training by the mixer of the bolus. Other treatises there are—one of them suffered to mingle with the rippling flow of the incident in "The Merry Wives of Windsor"—which skim this topic, the holding of an estate in fee simple. There Mistress Page speaks of Falstaff as one who is on the point of making (the confirmed evil-liver ready, in his fleet declension, to sacrifice the equity of redemption) a conveyance of that interest to the devil. Ponder the flaying deliverance: "If the devil have him not in fee simple, with fine and recovery, he will never, I think, in the way of waste, attempt us again!"

Consider, furthermore, the address where the King in fatherly talk with Prince Henry—the occurrence invoked for the lesson it furnished a being much too eager to cheapen his dignity—asserts that Richard II. was strikingly blind to his own interest when he "*enseffed* himself to popularity." Judge Allen finds room for censure of this allusion as untechnical and strained. The fault—if such there be—of its not being possible to accommodate the phrase with a rigid technicalness might, one would think, be overlooked in a flash of poetic imagery. And, as to the charge that the metaphor is strained, can it properly be argued that etymology forbids notice of a mood which

craved popularity as something to be enjoyed as firmly and durably as though its holder had been enfeoffed thereto? Through lines of the same dialogue, that irresponsible youth, who had incurred the reproach of his father, that, by his continuance in a debauched course of living, he allowed Hotspur to defraud him of fame on a stage where he should have brooked no rival, engages that—affiancing himself to arms—he will break with his evil companions, and wipe out the stigma borrowed from his antecedents: "Percy is but my factor, good my lord, to engross up glorious deeds in my behalf." How abundantly that promise was fulfilled the plain of Shrewsbury appeared to testify.

What experience other than a more or less extended period of tribulation spent in the murky den of an attorney could, it may be asked, have enabled the user to acquire such command of the prolixities of conveyancing as is evidenced by the following, imported, in the most fantastic connection imaginable, into "Troilus and Cressida": "In witness whereof, the parties interchangeably;" or by Rosalind's amazing overture, "with bills on their necks, be it known to all men by these presents"? And what must root more deeply the impression that Shakespeare derived these flourishes from some wrinkled parchment is the fact that both allusions are found printed between inverted commas. Nor is the proficiency thus betrayed less evident from the outline of a marriage-settlement vouchsafed by "The Taming of the Shrew": "And for that dowry, I'll assure her of her widowhood—be it that she survive me—in all my lands and leases whatsoever. Let specialties be therefore drawn between us, that covenants may be kept on either hand."

Conceive of a mere snatcher, from time to time, of eleemosynary crumbs of law, dropped from the lavish board of intimates in the profession—a gatherer, so to speak, of the learning's driftwood—*sandalled* entering

the holy mosque, and treating of a piscary—a license, even readers within the circle may need to be reminded, to fish in another man's waters. In addition to its other gratuities "The Merry Wives of Windsor" dishes for the Shakespearian banqueter this educative rarebit. One of the series of brilliant encounters of wits the spectator has a chance of viewing through panes in that airy edifice, "Love's Labor Lost," affords strong testimony of our poet's intellect having been liberally steeped in the profundities of Justinian. The dialogue, as far as it is in point, is reproduced.

Boyet: "No sheep, sweet lamb, unless we feed on your lips."

Maria: "You sheep and I pasture: Shall that finish the jest?"

Boyet: "So you grant pasture for me."

Maria: "Not so, gentle beast; my lips are no *common*, though *several* they be."

It may only be to sink in the yielding earth of conjecture to risk its exposition, yet, in the writer's judgment, by this passage is traced an accepted distinction in the character of estates, a rational perception of which could scarcely have been gained at random. Under this head of property, fuller enlightenment may be had from "The Merry Wives of Windsor." Evans, the Welsh parson, in a learned discourse, affirms that "the lips is *parcel* of the mouth," a use of the descriptive term almost wholly confined to law.

It will come, with ease, to the recollection of Shakespearian votaries that the usurping Duke, in "As You Like It," publishes, with reference to Orlando, this wintry decree: "Let my officers of such a nature make an *extent* upon his house and lands."

Furness objects to the allowance of an execution without a previous judgment. Cavilling, truly, if ever that has been exercised. Has an imaginative writer to pay such regard to minutiae as this? And if no latitude is to be conceded, why not go



deeper, and impeach the jurisdiction of the issuing authority, on the ground that executive and judicial functions never co-exist?

In "Othello" the serpentine Iago, who, in conversation with Roderigo, has been upbraiding the Moor for his neglect to advance him in his service, declares (having covertly inspected his *vade mecum*) that Othello "*nonsuits* my mediators." It would be a profitless exercise to inquire whether the full significance of this avowal came home to Shakespeare. No serious tax would seem, however, to be put upon reflection by supposing that a failure, on the part of Iago's champions, to make out even a *prima facie* case was meant to be conveyed.

Would it be possible for a text-writer to express that factor essential to the making of a false oath—competency in the administering officer—more tersely and lucidly than is done through the words of a mouthpiece in "Henry VI.":

"An oath is of no moment, being not took  
Before a true and lawful magistrate,  
That hath authority over him that swears."

Desdemona, who, accepting Iago's feigned excuse for Othello's altered conduct towards her, that matters of state disturbed him, is prompted to offer the *amende honorable* for believing that it might have sprung from less valid causes, thus delivers herself: "I was (unhandsome warrior as I am) arraigning his unkindness with my soul; but now I find I have suborned the witness, and he's indicted falsely." How subtle this taking unfounded opinion to task for having practised on her deeper consciousness!

As bearing on the branch of procedure, how capably is the well-established rule as to presence in court, on the occasion of his trial, of one charged with felony, signified through terms of the Bishop of Carlisle's protest—vehement as courageous—against the totally irregular deposition of Richard II. by Bolingbroke:

"Thieves are not judged but they are by to hear,  
Although apparent guilt be seen in them."

Could there be,—to prove his intimacy with knotty questions—a shrewder appreciation of what, in the composer's day, and long after, was treason-felony—depreciating the currency,—than is attested by the brilliant play of words investing this extract from a speech of Henry V. on the eve of Agincourt: "Indeed, the French may lay twenty French crowns to one, they will beat us; for they bear them on their shoulders: but it is no English treason to cut French crowns: and to-morrow the King himself will be a clipper." Can any impartial, honest inquirer, one prepared to hold evenly the scales of probability, esteem these purely technical expressions, which have been collated—so varied in their signification, so apposite in their employment—none other than the palming off on the public of an over-confident amateur, oracles delivered by some empty sciolist? Shakespeare's vamping, in every linguistic habit, of warrants and indentures—his ringing the changes on covenants and leases, bonds and testaments—howbeit, in handling these, he manifests alike a thorough comprehension of the form, and a secure insight into the use of the particular instrument on which his characters may touch, need not be emphasized.

The writer on the other hand (upholding in this the weight of opinion), is free to confess that the famous trial in "The Merchant of Venice"—with its extra-judicial emanations from the Duke, the scandalous bias that personage is found to exhibit; with the constituting Portia not merely his assessor, but letting her deliver his rulings; with the forced construction of the bond which is made to govern (passing by the utter irreconcilableness of such an action with the province of any enlightened court); with the astonishing freedom of utterance enjoyed by strangers to the hearing—pilloric judicial gravity, lends judicial methods the guise of opera bouffe. After all, how does this tell against the idea that Shakespeare was indoctrinated, by some unwonted process, in the ways of jurisprudence? Either as *habitué* of the courts, or one in a position to have

imbibed everything requisite to become a trustworthy guide as to the conduct of a trial, he well knew, when fabricating the scene in question to reach the effect intended, that he was trampling on ail precedent. Through the arraignment, as well, of Hermione, in "The Winter's Tale," the playwright, by making Leo s the tribunal to pass upon her crime (and the consideration that her imputed lapse was of such a nature that passion would inevitably overthrow judgment), aggravates the offence—violates one of the most hallowed institutes of law; at the same time, withdrawing from a criminal one of his dearest sa'eguards that no man shall be judge in his own cause. It is difficult to say what is impressed the more distinctly on one's attention,—what appeals the more strongly to one's critical faculty—the disingenuousness preached in the sentence quoted, or the humor it provides—donation, as it is, of a speaker who proceeds, without delay, to enforce the ordeal at command of the French *Juge d'instruction*, than which nothing less consonant with fair play could

be imagined: "Let us be cleared of being tyrannous, since we so openly proceed to justice."

It may interest the profession to learn that Shakespeare anticipated the fusion of the courts, which, in England, has for some years been a *fait accompli*. King Lear, calling up, in his madness, a vision of Goneril and Regan being tried for their inhuman treatment of him, resolves to appoint judges. Their commission, if brief, is adequate:

"Thou robèd man of Justice" (to Edgar)  
 "take thy place,  
 And thou" (to the fool) "his yokefellow of equity,  
 Bench by his side."

Unless the explanation that Lear's own senses were too clouded to distinguish between his friends be open, a reflection on the status—a drawback from the renown—of Chancery is implied from his joining the representative he does with common law in this investigation.

## THE BLACK EAGLE CASE.

BY LEE M. FRIEDMAN.

**I**N imitation of the "laudable statute of the most wise and worshipful council of the City of Amsterdam," in the year 1647, Peter Stuyvesant, Director General of the New Netherlands, in order to prevent the too rash drawing of knives, fighting, wounding and consequent accidents," enacted and ordained that "whosoever shall in passion or in anger draw, or cause to be drawn, a knife or dagger against another, shall forthwith incur a fine of one hundred carolus guilders; or in case he failed to pay the money he shall, as a punishment, be set for half a year to hard labor, on bread and water; and if he wounded any one therewith, three

hundred like guilders, or to spend a year and a half at the aforesaid labor." The Director General caused the words of this ordinance to be placarded throughout all the towns of the colony and to be read aloud by the burghers and schēpen in each market place. He charged and commanded "all fiscals, lieutenants, sergeants and corporals to use all opportunities, visits and due diligence, without any simulation, in attacking and apprehending the contraveners hereof, in order that they may be prosecuted according to law."

It was at this time that Cornelius Van Tienhoven was shériff of New Amsterdam,

and it became his duty to see that this ordinance was properly enforced. Now Cornelius was one of the great personages of the colony, who managed to lead a free and easy life in the enjoyment of the fat revenues of several sinecures. Among other positions he was both fiscal of the Honorable West India Company and schout of New Amsterdam. The Director General and Council of New Netherlands might enact statutes and the burghers and schepens pass orders and give judgments, but old fat Cornelius paid no attention to them at all and his will was the law of the land. No statute of the colony and no judgment of the law courts received the slightest attention in New Amsterdam unless they met with his approval. In vain the burghers petitioned that "a separation of jurisdiction may be made between the fiscal of the Honorable West India Company and the schout." In vain the burgomasters and schepens complained "that Fiscal Tienhoven is still filling that place (schout or sheriff), but with so little satisfaction to the body of the burghers and with indifferent respect for us, that we cannot comprehend how said Tienhoven can consistently serve in the office of the schout together with that of fiscal; for in his capacity as fiscal he acts without our knowledge against the burghers, puts them in prison and again discharges them." But Cornelius was powerful enough in spite of them to keep matters in his own hands and to grow rich in office, giving the people just as little as he chose for them to receive. However, conditions changed in 1649. The reform element, emerging into some sort of a citizens' league, remonstrated to the "High and Mighty Lords of the States General of the United Netherlands," and Van Tienhoven was most valiantly scored. "To every one who has business with him, and there is scarcely one but has," it was stated, "he gives a favorable reply, promises assistance and then assists scarcely anybody, or leads them continually off on some course or the other, except the minister's friends.

In his words and acts he is loose, false, deceitful and given to lying; prodigal of promises, and when it comes to performances nobody is home."

So the reformers talked and wrote and remonstrated and were listened to with attention and respect, and Van Tienhoven kept silent and continued to hold his offices and to draw fat salaries.

In short, it is evident that it did not suit the convenience of the sheriff to apprehend "the contraveners" of this ordinance. Perhaps those who were prone to the "rash drawing of knives, fighting and wounding" were themselves friends of the minister. At any rate the earliest case upon the records of New Amsterdam relating to this statute dates from the year 1655, eight long years after its enactment. Here is the record of it:

Wednesday the fourteenth day of April, 1655, the Black Eagle dropped anchor in the harbor of New Amsterdam, after a rough four months' voyage. Of course every man in the crew hastened straight away to the nearest tavern, there to celebrate his safe arrival in the full bumpers before the dread nine o'clock bell should toll the signal at which in those days all "taps" had to be closed. It is evident that they did not confine their attention to beer, but yielded to the temptation of the good old Holland "schnaps," for at closing time old Jan Schuyver found difficulty in getting rid of his jolly guests. At last he called in the skipper to take off his crew. Young Van Spreckerhoorn no sooner caught sight of his skipper than he insisted upon being paid then and there the whole balance of his wages, so that he might furnish his companions with one more round of drinks. He would not listen to reason. When refused he raged and stormed, until finally he made a mad rush upon the skipper with a "naked knife" and cut him in the hand.

Now Cornelius Van Tienhoven happened to be entertaining a few select friends at a neighboring inn and was greatly disturbed at the noise of these drunken sailors, and

when he sallied forth to quell the disturbance he was in no very good humor. Cornelius, quite out of breath, arrived upon the scene just at the time of the assault. Instantly he saw a twofold opportunity. Not only could he get rid of this very noisy disturbance, but here was a chance to show how he was diligently enforcing the law. He promptly called the watch, and ordered Van Spreckerhoorn to be taken to the jail.

The following Friday the sheriff brought the sailor before the Worshipful Court of Burgomasters and Schepens, and complained in most elaborate pleadings of this Ayran Jansen Van Spreckerhoorn for having committed a violent assault with drawn knife, and *ex officio* requested of their honors that this same "Ayran Jansen be punished as an example to others, according to the tenor of the Placard, dated XVI May, 1647." The Herr officer, on being asked for proof, explained the facts and requested that the prisoner might be called upon to answer to the charge. Accordingly Ayran came forward and pleaded that "he did not know what he did, inasmuch as he was drunk, and prays mercy." Whereupon the sheriff demanded a cross-examination of Ayran, which *in extenso* appears on the records as follows:

Question 1: Does he not know where he drew his knife on the skipper?

Answer 1: No, as he was drunk.

Q. 2: Did he then draw any knife?

A. 2: Yes, against the sailors, who held a knife against his face.

Q. 3: Does he not know whether he had any words with the skipper?

A. 3: No.

Q. 4: Does he not know that he hath wounded the skipper?

A. 4: No; nor even that he threatened him.

Q. 5: Does he not know who was by or about?

A. 5: Yes; he says that the skipper struck him.

Q. 6: Did he ever quarrel with the skipper before?

A. 6: No.

Thereupon the Court ordered that the "officer shall produce his proof in support of his action, as he claims, by next Monday. Meanwhile the prisoner shall be again remanded to prison."

On the following Monday the Court again assembled, and called Ayran before them for sentence. Meantime the skipper appeared in court and interceded in behalf of Ayran, and made light of his wounds. Whereupon "their worships of the Court, in consideration of the delinquent's youth and the intercession of the skipper," gave judgment that "the aforesaid Ayran Jansen Van Spreckerhoorn appear in court, and there, with uncovered head, ask forgiveness of God, Justice and his skipper; that he defray the costs of arrest and pay, in addition, a fine of sixty carolus guilders, to be applied one-half to the officer, the remainder to the City."

There is never a word more of the sixty carolus guilders; but the keeper of the records has added in the margin, for the benefit of curious readers, that "Ayran Jansen Van Spreckerhoorn did appear in court and fulfilled the first part of his sentence, namely, begged the pardon of God, the Court and the skipper."



## REGRETS.

By MR. JUSTICE —, *on being invited to the play.*

I HOPE you'll not complain if I  
Decline, with thanks, your kind "invite."  
Let me explain the reason why  
I'll not attend the play to-night.

A tragedy, you say, they'll act,  
With stirring scenes of love and war;  
The same effect I'll get, in fact,  
And yet not go one half so far.

I'll take me down from off the shelf  
The General Statutes of the State,  
And revel, then, all by myself,  
In plays of men who legislate.

With Tarquin strides I'll walk the floor,  
Declaiming from the civil code,  
Reciting loudly, o'er and o'er,  
The tragic laws of fence and road.

I'll shiver at the felon's fate,  
And read the words so free from doubt,  
Which made him labor for the State  
For years—or till he's pardoned out.

'Tis strange no actor of this age,  
(At least, so far as I'm advised),  
Has set these Statutes for the stage,  
And had their sections dramatized.

The dramatist must not suppose  
That in this solemn compilation  
He'll find rich jokes and fun, for those  
Show only in its application.

## THE JURY.

THE main criticisms of trial by jury, says Mr. Justice Brewer, of the United States Supreme Court, in an interesting article under the above title in *The International Monthly*, are directed against three points: first, the provision that the jury must be composed of twelve persons; second, the methods used for the purpose of securing a jury free from prejudice or predetermined opinion of the merits of the controversy; and third, the requirement that the decision be the unanimous agreement of the twelve jurors.

Concerning the number of the jurors, the learned Justice finds that "there is no magic in that number, no mysterious reason why there should be twelve rather than eight or sixteen. The purpose in requiring a jury to be composed of several persons is to ascertain the average judgment of the community on the merits of the controversy. Through representations of the different vocations and different classes such average judgment will probably be secured. It is not likely to be expressed in the opinions of twelve doctors or twelve merchants or twelve farmers. But it would be futile to attempt to secure upon a jury even one representative of every form of industry and every class in life. Practically, the number should be large enough to secure a fairly average representation of the great body of citizens, and not so large as to be unwieldy or expensive. It may well be that where a man's life is at stake or where the amount in controversy is large, twelve should not be regarded as excessive, but where lighter offences are charged or the amount in controversy is small, it would seem that the ends of justice would be subserved were there but six or eight jurors; and certainly time and money would be saved thereby."

After referring to the frequent difficulty and delay in securing a jury, especially in

criminal cases, and noting the fact that oftentimes the best qualified men are excused from jury duty, while their places are taken by the ignorant or untrustworthy, he has this to say:

Before the day of the newspaper there was seldom any particular harshness or delay, for there was little trouble in securing competent men, who had not even heard of the controversy. But now, with the press searching the corners of the country for every event of even trifling importance, it is almost impossible to find intelligent men in any county who have not heard something of every important case arising therein, who have not formed some opinion from what they have heard.

It is not strange that much condemnation is heard of these protracted labors in impaneling a jury and of the unfortunate results which sometimes appear. And there must be a change, either through the action of the legislatures or of the courts themselves. No man should be held disqualified because he has read the newspaper report of a transaction or even heard some of the witnesses speak of it, and from such reading or hearing has formed a mere passing opinion upon the case. No one for a moment supposes that the judge is disqualified or that he will incorrectly declare the law, although he may have heard the whole story of the transaction. No more should an intelligent, honest man be held disqualified from passing judgment upon the facts for the simple reason that he has read or heard the story. Of course if he has a settled, positive conviction, that is reason for his excuse. There is something radically wrong in a system or practice which permits such a consumption of time, and often ends in bringing the most incompetent men on to the jury. While doubtless the presiding judge is often responsible for this result, there is

a cause, inherent in the system, which must not be ignored, and that is the rule requiring unanimity,—the sixth element I have mentioned. Every one knows that in an important and hard case the struggle of counsel is to secure upon the jury one or more who are friendly to their client, or in sympathy with the cause or interest with which he is identified, or who may be easily influenced by appeals to prejudice or sympathy. The intelligent business man, the mechanic, and the farmer, too quickly respond to the voice of the judge demanding justice, and hence, if possible, they must be excluded, and the ignorant, easily moved by appeals of counsel, secured. Let the rule of unanimity be abolished and the result determined by the conclusions of two-thirds or three-fourths of the jury, and this struggle after the single helpful juror will largely disappear. And why should it be deemed essential? Neither in legislative halls, among judges, in arbitration proceedings, nor in scarcely any other body called to make a determination, is it the rule. In my judgment, the great objection to the jury system, as it is administered to-day, and the one which more than any other, threatens its overthrow, is this rule of unanimity. Were it abolished, less time would be wasted in impaneling a jury, and a better class of jurors would ordinarily be selected. More than that, the truth would be more certainly determined. How often, in criminal cases, do ten or twelve jurors yield to the obstinacy of the remaining, and agree on a verdict for a lower degree of crime than they really believe the defendant to be guilty of! And in actions for the recovery of money how often is the amount of the verdict affected by the obstinacy of a single juror!

If the jury is to be preserved, some other things must be done,—things necessary to elevate its character, make it a fair representative of the highest intelligence of the community, or at least of the average, and not, as it now generally is, of the lowest in-

telligence. All know that the ordinary business man, the intelligent citizen, shirks jury duty with about as much zeal as he runs from a rattlesnake; that there are a multitude of loafers around a court room seeking the meagre pay which attaches to the position, who cultivate the lawyers, and become professional jurors. I make these suggestions as helpful in the matter. First, give them better compensation. As a rule, they are paid no more than the ordinary day wages of an unskilled laborer, and it is generally true that poor pay brings poor service. Better eight jurors reasonably paid than a dozen poorly paid. Secondly, free the work of the juror from some of the disagreeable annoyances which now too often attend it. He should not be compelled to work more hours than the judge. To shut him up and keep him confined day and night is a crime against society. He is treated too often as an object of suspicion,—as though he were probably dishonest, and must be specially shielded from temptation. Why should he be shut up, while the judge is not? A bad man on the bench or in the jury box will surely find ways to be tempted, and few things are more calculated to degrade his office in the sight of the juror, and to bring out all the evil that is in him, than the consciousness that he is an object of suspicion. I have been nearly thirty-seven years on the bench, and take pleasure in recalling that, so far as it was possible, I always relieved the juror from confinement other than such as I myself submitted to; that I endeavored to make him in the discharge of his duties free from suspicion and annoyance. And I have not the slightest reason to doubt that the course thus pursued resulted not merely to the comfort of the juror, but in a better administration of justice.

Some of the changes which I have suggested, particularly that in respect to the number of jurors and the rule of unanimity, can only be accomplished through constitutional amendment. It is a very difficult

matter to secure an amendment of the Federal Constitution, and not an easy one of a State constitution, and yet there is a growing effort to secure such amendments. Utah's constitution provides for a jury of eight, and the validity of that provision was sustained by the United States Supreme Court in *Maxwell v. Dow*, 176 U. S. 581.

But the final question is, whether it is worth while to preserve the system, even with the amendments suggested. For myself, I believe in the jury, and that it should be preserved as a factor in judicial investigations, and for these, among other reasons. It is a tribunal which comes into being with the occasion, and vanishes with the end of the trial. The community soon forgets who sat upon it, and there is no building up of prejudice against the individuals who composed it. How seldom do we see in the papers any complaint of the jurors who try a case, while the judge who presides at the trial is often thereafter the subject of bitter attack!

Again, there are many questions whose determination cannot be according to any strict rules of measurement, and yet they must be settled. Is there any better way than, as it were, by asking the community how they should be settled? and that is done by leaving them to a jury, who, in theory at least, announce the average judgment. Take suits for personal injuries. Who shall say how much an arm or a leg is worth? An attempt to give, as judges are expected to give, reasons for fixing upon the precise amount would be futile. A jury hears the testimony, sees the injured party, and awards that which according to its combined judgment, is fair compensation. And yet no one of the jurors might be able to figure out with

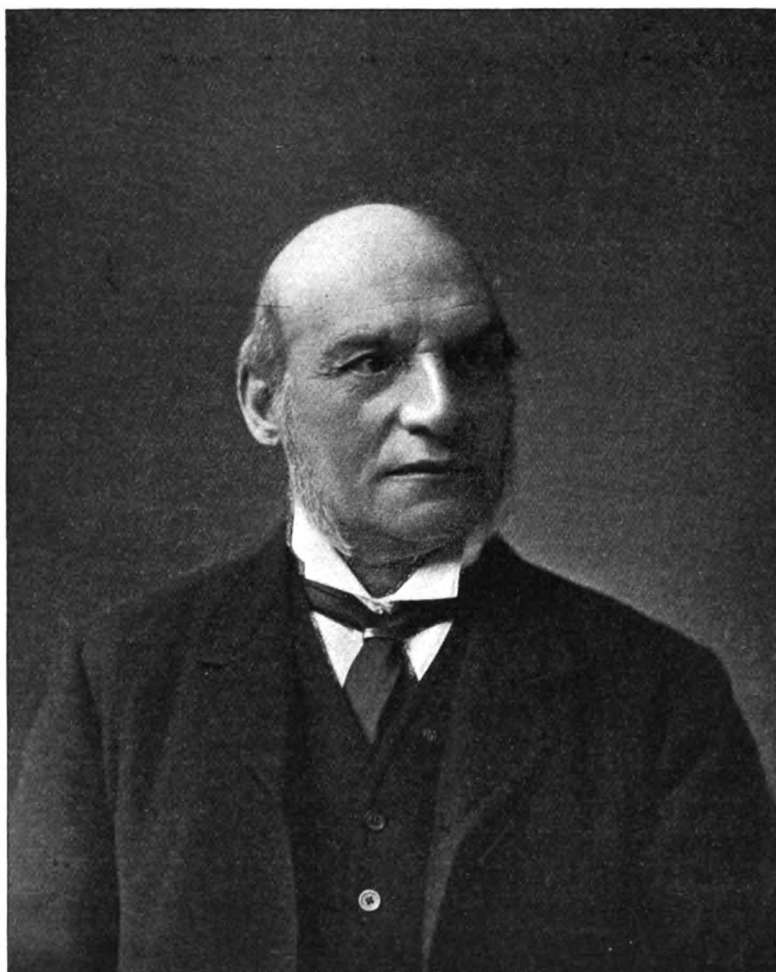
pen and pencil exactly how he reached his conclusion.

So, also, there are many cases in which contradictory testimony appears, and it is a great relief to a judge, sitting from day to day, and year to year, not to have to determine between conflicting witnesses, nor be called upon to state which he thinks has told the truth. The jury gives no reasons, simply states its conclusions, and seldom does any witness thereafter feel that by the jury, or any particular member thereof, his testimony has been wholly disregarded, and he in effect branded as a perjurer.

And, finally, it is of importance that the people as a whole should realize that the administration of justice is a part of their work. We cannot too often repeat the statement that if popular government is to continue, all must take an interest therein, and realize that upon each one rests some share of responsibility; and the administering of justice is one of the peculiar duties of government. So there should be brought home to every individual the thought that he is personally responsible for the way in which justice is administered; and if, from time to time, he serves as a juror, he can but feel that he is partially, at least, discharging that responsibility, and is helping to secure a more perfect administration of justice in the community. There are other reasons, but the length of this article constrains me to stop. I have pointed out those which, in my judgment, render the preservation of the jury a matter of importance. Make such changes in its organization, its surroundings, and manner of work as will elevate its tone and character, while at the same time they do not destroy its essential features.







LORD HERSCHELL.

## A CENTURY OF ENGLISH JUDICATURE.

## XII.

BY VAN VECHTEN VEEDER.

IN the House of Lords Bramwell (1882-92) exerted, in the main, the same general influence for good that characterized his earlier judicial service. Perhaps his unconventionality was even more conspicuous in his new surroundings; certainly no more vigorous and original personality had enlivened that court since the days of Thurlow and Westbury. Although he was to some extent overshadowed by the commanding authority of Blackburn, he was sturdily independent in his views; and even when wrong—for he was often in the minority—he used his mother-tongue with the same directness and dry humor. At a very advanced age he showed no decay in mental power; his strong opinion in the *Vagliano* case was delivered in his eighty-second year. But it is observable that his personal views on certain topics which had not commanded judicial assent became in later years more pronounced and extreme.

Lord Herschell's conspicuous judicial service in the House of Lords (1886-99) entitles him to a place among the great judges of the last quarter of the century. If he fell short of Cairns' breadth of mind and lacked Selborne's subtlety he had, nevertheless, in large measure the qualities which make for judicial excellence. His most prominent characteristics were indefatigable industry, thoroughness and accuracy. Not even Lord Selborne more completely exhausted a subject than did Herschell in such leading cases as *Derry v. Peek*, *Bank of England v. Vagliano*, *Allen v. Flood*, *London Joint Stock Bank v. Simmons*, *British South Africa Co. v. Mozambique*, *Russell v. Russell*, *Trego v. Hunt*, the *Maxim-Nordenfelt* case, and many others. In his zeal to leave no consideration unnoticed, he sometimes seems to wander around the issue, instead of

aiming directly at it as Cairns did. But this fault is confined mostly to his earlier opinions; his work improved steadily in structure and finish, and his best efforts are among the highest models of judicial exposition. He was a man of broad views. The basis of his very able opinion in the great case of *Allen v. Flood*, (1898) A. C. 1, is conclusive evidence of this: "I do not doubt that everyone has a right to pursue his trade or employment without 'molestation' or 'obstruction,' if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely, that every one has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition in my opinion has no solid foundation in reason to rest upon. A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work, is in law a right of precisely the same nature, and entitled to just the same protection, as a man's right to trade or work. They are but examples of that wider right of which I have already spoken. That wider right embraces also the right of free speech. A man has a right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium. Unless he is thus shown to have abused this right, why is he to be called upon to excuse or justify himself because his words may interfere with some one else in his calling?"

No more luminous illustration of the evo-

lution of law can be found in the reports than his consideration in the *Maxim-Nordenfelt* case, (1894) A. C. 535, of the application of the old rule with respect to general restraint of trade under the changed conditions of commerce and of the means of communication which have been developed in recent years. To disregard these changed conditions would be, he said, "to miss the substance of the rule in a blind adherence to its letter. Newcastle-upon-Tyne is for all practical purposes as near to London to-day as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent to Newcastle more quickly than it could have been transmitted from one end of London to the other, and goods can be conveyed between the two cities in a few hours and at a comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances, and that which would have been once merely a burden on the covenantor may now be essential if there is to be reasonable protection to the covenantee. . . . Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I think was long recognized as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law." "It must not be forgotten," he adds, "that the community has a material interest in maintaining the rules of fair dealing between man and man. It suffers far greater injury from the infraction of these rules than from contracts in restraint of trade."

Lord Herschell believed that it was a

judge's duty to interpret and administer the law, not to make it. He was sturdily averse to the process of refinement, by means of which particular cases were withdrawn from the application of general rules. A strong illustration of this characteristic may be found in his opinion in the celebrated case of *Russell v. Russell*, (1897) A. C. 460, where it was sought to extend the legal doctrine with respect to cruelty in matrimonial relations so as to cover the facts of a particular case. "The only criterion of cruelty which I have heard suggested as warranting a judgment for the appellant," said Lord Herschell, "is whether the discharge of the duties of married life has become impossible owing to the conduct of the respondent. How is the word 'impossible' to be interpreted in the proposition thus stated? . . . If it be extended to what is sometimes called 'moral' impossibility, a proposition could scarcely be conceived more elastic. It would afford no sort of guide, but would, in my opinion, unsettle the law and throw it into hopeless confusion. Views as to what is possible in this sense would differ most widely. . . . Not a few would think that the discharge of the duties of married life was impossible whenever love had been replaced by hatred, when insulting and galling language was constantly used, when, in short, the ordinary marital relation no longer prevailed. One opinion may be held by many that it would be well that in all such cases a judicial separation should be granted—that relief should always be given where the prospect of happiness so long as the parties cohabited appeared hopeless. But these are considerations for the legislature, not for the courts. . . . Our duty, on the present occasion, is to administer, not to make the law. I have no inclination towards a blind adherence to precedents. I am conscious that the law must be moulded by adapting it on established principles to the changing conditions which social development involves. But marital misconduct is, unfor-

tunately, as old as matrimony itself. Great as have been the social changes which have characterized the last century, in this respect there has been no alteration, no new development. I think it is impossible to do otherwise than proceed upon the old lines."

negligently, but with an honest belief in its truth, would not sustain an action for deceit, he said: "I have arrived, with some reluctance, at the conclusion to which I have felt myself compelled, for I think that those who put before the public a prospectus to



LORD HALSBURY.

While he believed that the amendment of the law should be left to the legislature, he was not unmindful of the hardship often occasioned by the application of established rules. But he held that "in laying down a proposition of law it is necessary to keep in view the consequences, and not to contemplate its operation in the particular case." Therefore, in holding, in *Derry v. Peek*, 14 A. C. 376, that an untrue statement made

induce them to embark their money in a commercial enterprise, ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought, to some extent, to be converted into a legal obligation, and that the want of reasonable care to see that

statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done, the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent, whether his acts can or cannot be justly so designated."

In common with many "strong" judges, Lord Herschell was much given to interrupting counsel during argument. His propensity in this direction is said to have been temporarily checked when, during the hearing of the case of *Allen v. Flood* one of his more conservative colleagues remarked with caustic humor, "We can all pretty well understand from the present proceedings what amounts to molesting a man in his business."<sup>1</sup>

Lord Halsbury, the present Chancellor, enjoys the double distinction of having risen to the woolsack from the criminal bar, and of having held this high office under three administrations. These facts are, in themselves, evidence of varied ability and marked

force of character. If he does not possess the profound knowledge of equity which distinguished his more eminent predecessors, his wide experience at the bar developed other gifts not less essential than learning to the successful discharge of the multifarious duties with which the chancellor is now entrusted. A distinguished French observer has described the English Chancellor as a living image of the Trinity, embodying in his own person the three independent elements of government. As a peer, as speaker of the House of Lords, and as a member of the cabinet, he participates in legislation. As the creator of judges, with extensive administrative duties in regard to the courts, he represents the executive. In his judicial capacity he is president of the Court of Appeal and of the High Court, with a statutory right of sitting as a judge of first instance, if he so desires. But he is now seldom seen in the Court of Appeal, and never, I believe, in the High Court. Many years have passed since he sat as a judge of first instance, and, except when an occasional press of business may demand his presence in the Court of Appeal, the Chancellor's strictly judicial duties are now confined to the House of Lords. As presiding judge of the court of final appeal, Lord Halsbury has served through many years with credit to himself and to the satisfaction of the bar. Among colleagues of greater special acquirements he has displayed unfailing tact and self-reliance, and the record of his judicial service reveals the good sense which results from wide experience with men and affairs. Doubtless his peculiar training would have given him greater distinction as chief of the common law bench; there his admirable insight into human nature would have been more conspicuous. But one may venture to predict that some of Lord Halsbury's opinions as a judge of appeal will be often cited for their straightforward expression and trenchant force. An illustration, with respect to a

<sup>1</sup> The following are Lord Herschell's ablest opinions: *Allen v. Flood* (1898), A. C. 1; *Nordenfelt v. Maxim-Nordenfelt* (1894), A. C. 535; *British South Africa Co. v. Mozambique* (1893), A. C. 602; *Bank of England v. Vagliano* (1891), A. C. 107; *Solomon v. Solomon* (1897), A. C. 22; *Russell v. Russell* (1897), A. C. 395; *Smith v. Baker* (1891), A. C. 325; *Derry v. Peek*, 14 A. C. 359; *The Bernina*, 13 A. C. 1; *Reddaway v. Banham* (1896), A. C. 207; *London Joint Stock Bank v. Simmons* (1892), A. C. 201; *Trego v. Hunt* (1896), A. C. 7; *Concha v. Concha*, 11 A. C. 541; *White v. Mellin* (1895), A. C. 155; *Oreogum Gold Mining Co. v. Roper* (1892), A. C. 125; *Trevor v. Whitworth*, 12 A. C. 409; *Alexander v. Jenkins* (1892), 1 Q. B. 797; *Mackenzie v. Mackenzie* (1895), A. C. 388; *Wild v. Waygood* (1892), 1 Q. B. 783; *Tabley v. Official Receiver*, 13 A. C. 523; *Hauthorn v. Traser* (1892), 2 Ch. 27; *Commissioners of Income Tax v. Pemsel* (1891), A. C. 531; *London County Council v. Erith* (1893), A. C. 562; *Ward v. Dunscomb* (1893), A. C. 369; *Barnado v. McHugh* (1891), A. C. 388; *Woodward v. Goulston*, 11 A. C. 469; *Makin v. Atty. Gen.* (1894), A. C. 57.

topic of general interest, may be taken from his opinion in the case of the *Queen v. Jackson*, (1891) 1 Q. B. 678, where a wife who had left her husband's house was forcibly brought back by her husband, who claimed the right to restrain her there. "I confess," says Lord Halsbury, in the course of his opinion, "that some of the propositions which have been referred to during the argument are such as I should be reluctant to suppose ever to have been the law of England. More than a century ago it was boldly contended that slavery existed in England; but if any one were to set up such a contention now it would be regarded as ridiculous. In the same way, such quaint and absurd *dicta* as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authorities in a court of justice in this or any civilized country. It is important to bear this in mind, for many of the statements, which have been relied upon, of a more moderate character and less outrageous to common feelings of humanity, are bound up with these ancient *dicta* to which I refer. The only justification, as it appears to me, for such expressions as are found in some of the old books is that afforded by the free translation given to them by Hale, C. J., who suggests that '*castigatio*' may be taken to mean admonition merely; whether the word will bear that translation in these passages I cannot say; but I am glad that some one, even at that early period, thought it inconsistent with the rights of free human creatures that such a power of personal chastisement of the wife should exist."<sup>1</sup>

<sup>1</sup> Some of the best specimens of his powers are: *Allen v. Flood* (1898), A. C. 1; *Monson v. Madam Tassaud*, 63 L. J., Q. B. 454; *R. v. Jackson*, 64 L. T. 679; *Derry v. Peek*, 14 A. C. 337; *Membery v. Great Western Ry.*, 14 A. C. 179; *Great Western Ry. v. Bunch*, 13 A. C. 31; *London, etc., Ry. v. Truman*, 11 A. C. 45; *Adam v. Newbigging*, 13 A. C. 308; *Macdougall v. Knight*, 60 L. T. 762; *Cox v. Halles*, 63 L. T. 679; *Bank of England v. Vagliano* (1891), A. C. 107; *London Joint Stock Bank v. Simmons* (1892), A. C. 201; *Mogul Steamship Co. v. McGregor*, A. C. 25; *Smith v. Baker* (1891), A. C. 531; *Russell v. Russell* (1897), A. C. 395.

## THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

By the Judicature act of 1876 provision was made for the ultimate substitution of the two Lords Ordinary of Appeal for the four paid members of this Court, and thus for ultimate fusion with the House of Lords. It is made up of the Lord President, such members of the Privy Council as hold or have held high judicial office, the Lords Justices of Appeal and a limited number of Privy Councillors appointed by the Crown.

In recent years several colonial judges have been added to the tribunal, thus bringing it in closer touch with the vast empire for which it administers justice.

Its jurisdiction includes colonial, Indian and ecclesiastical appeals, petitions for the prolongation of letters patent and matters specially referred to it by the Crown. The tribunal has been dominated in recent years by the vast learning and powerful intellect of Lord Watson, who sat in this court for a longer period than any permanent member, except Lord Kingsdown, by whom alone Watson's substantial contributions to imperial law are equalled.

The variety, novelty and importance of the questions coming before this tribunal lend to it an interest which transcends the merits of individual controversies. The cases specially referred by the Crown often involve questions of fundamental importance; and, apart from the recognized right of appeal from the colonies, the Privy Council may give special leave to appeal in cases of general or constitutional importance, or in criminal cases where grave injustice may have been done (*Re Skinner*, 3 P. C. 451; *Prince v. Gagnon*, 8 App. Cas. 102; *Re Dillet*, 12 App. Cas. 459; *Levien v. Reg.*, 1 P. C. 536). Moreover, there is hardly any system of civilized law which does not prevail in some parts of the vast empire subject to the jurisdiction of this court,—in the West Indies the civil law of Spain, in Canada the civil law of France, in

Africa the Roman law as modified by the Dutch, in India the laws of the Hindoo and the Mohammedan. Therefore, whether ultimately incorporated with the House of Lords to form a single court of appeal for the whole empire, or exercised as heretofore in an independent tribunal, this great imperial jurisdiction is a matter of vast moral

as well as legal significance. It is an effort, by sustaining diverse customs and principles of right which have been consecrated by long usage and stamped with the approval of generations, to heed that cry of humanity heard through all the ages for justice and peace among men.

THE END.

### A STRANGE EXPERIENCE

BY JOHN DE MORGAN.

**I**T is not given to many men to be hanged and buried, and yet be able to tell the tale, but such was the experience of one John Bartendale, who was executed at York in 1634 for felony. After his body had hung for nearly an hour, it was buried. A gentleman passing by the grave, which had not been filled up, thought he saw the earth move, and with the help of his servant, he disinterred the convict, who was still alive. It was the custom, in those days, to bury suicides and executed criminals without any coffin. The man was carefully treated, and entirely recovered. He became hostler at the coaching house in York and lived a most exemplary life. When asked what he could tell in relation to hanging, as having experienced it, he replied: "That when I was turned off flashes of fire seemed to dart from

my eyes, from which I fell into a state of darkness and insensibility." The incident is referred to in a rhyming itinerary, known as "Drunken Barnaby's," which used to be very popular with street venders in the North of England.

A piper being here committed,  
Guilty found, condemned and titted;  
As he was to Knavesmire going,  
This day, quoth Boys, will spoil thy blowing;  
From thy Pipe th'art now departing;  
Wags, quoth th' Piper, you're not certain.  
All which happen'd to our wonder,  
For the halter cut asunder,  
As one of all life deprived,  
Being bury'd, he reviv'd;  
And there lives and plays his measure,  
Holding hanging but a pleasure.



ABRAHAM LINCOLN.

*From an address before the Philosophical Institution of Edinburgh.*

BY HON. JOSEPH H. CHOATE.

AT the age of twenty-five, Lincoln became a member of the Legislature of Illinois, and so continued for eight years, and, in the meantime, qualified himself by reading such law books as he could borrow at random—for he was too poor to buy any—to be called to the Bar. For his second quarter of a century—during which a single term in Congress introduced him into the arena of national questions—he gave himself up to law and politics. In spite of his soaring ambition, his two years in Congress gave him no premonition of the great destiny that awaited him, and at its close, in 1849, we find him an unsuccessful applicant to the President for appointment as Commissioner of the General Land Office, a purely administrative bureau, a fortunate escape for himself and his country. Year by year his knowledge and power, his experience and reputation extended and his mental faculties seemed to grow by what they fed on. His power of persuasion, which had always been marked, was developed to an extraordinary degree, now that he became engaged in congenial questions and subjects. Little by little he rose to prominence at the Bar, and became the most effective public speaker in the West. Not that he possessed any of the graces of the orator, but his logic was invincible, and his clearness and force of statement impressed upon his hearers the convictions of his honest mind, while his broad sympathies and sparkling and genial humor made him a universal favorite as far and as fast as his acquaintance extended.

These twenty years that elapsed from the time of his establishment as a lawyer and legislator in Springfield, the new capital of Illinois, furnished a fitting theatre for the development and display of his great fac-

ulties, and with his new and enlarged opportunities he obviously grew in mental stature in this second period of his career, as if to compensate for the absolute lack of advantages under which he had suffered in youth. As his powers enlarged, his reputation extended, for he was always before the people, felt a warm sympathy with all that concerned them, took a zealous part in the discussion of every public question, and made his personal influence ever more widely and deeply felt.

My professional brethren will naturally ask me, how could this rough backwoodsman, whose youth had been spent in the forest or on the farm and flatboat, without culture and training, education or study, by the random reading, on the wing, of a few miscellaneous law books, become a learned and accomplished lawyer? Well, he never did. He never would have earned his salt as a writer for *The Signet*, nor have won a place as advocate in the Court of Session, where the technique of the profession has reached its highest perfection, and centuries of learning and precedent are involved in the equipment of a lawyer. Dr. Holmes, when asked by an anxious young mother, 'When should the education of a child begin?' replied, 'Madam, at least two centuries before it is born,' and so I am sure it is with the Scots lawyer.

But not so in Illinois in 1840. Between 1830 and 1880 its population increased twentyfold, and when Lincoln began practicing law in Springfield, in 1837, life in Illinois was very crude and simple, and so were the courts and the administration of justice. Books and libraries were scarce. But the people loved justice, upheld the law, and followed the courts, and soon found their



favorites among the advocates. The fundamental principles of the common law, as set forth by Blackstone and Chitty, were not so difficult to acquire, and brains, common sense, force of character, tenacity of purpose, ready wit and power of speech did the rest, and supplied all the deficiencies of learning.

The lawsuits of those days were extremely simple, and the principles of natural justice were mainly relied on to dispose of them at the Bar and on the Bench, without resort to technical learning. Railroads, corporations absorbing the chief business of the community, combined and inherited wealth, with all the subtle and intricate questions they breed, had not yet come in—and so the professional agents and the equipment which they require were not needed. But there were many highly educated and powerful men at the Bar of Illinois, even in those early days, whom the spirit of enterprise had carried there in search of fame and fortune. It was by constant contact and conflict with these that Lincoln acquired professional strength and skill. Every community and every age creates its own Bar, entirely adequate for its present uses and necessities. So in Illinois, as the population and wealth of the State kept on doubling and quadrupling, its Bar represented a growing abundance of learning and science and technical skill. The early practitioners grew with its growth and mastered the requisite knowledge. Chicago soon grew to be one of the largest and richest and certainly the most intensely active city on the continent, and if any of my professional friends here had gone there in Lincoln's later years to try or argue a cause, or transact other business, with any idea that Edinburgh or London had a monopoly of legal learning, science, or subtlety, they would certainly have found their mistake.

In those early days in the West, every lawyer, especially every court lawyer, was necessarily a politician, constantly engaged in the public discussion of many questions evolved from the rapid development of town,

county, state, and federal affairs. Then and there, in this regard, public discussion supplied the place which the universal activity of the press has since monopolized, and the public speaker who, by clearness, force, earnestness, and wit, could make himself felt on the questions of the day would readily come to the front. In the absence of that immense variety of popular entertainments which now feed the public taste and appetite, the people found their chief amusement in frequenting the courts and public and political assemblies. In either place he who impressed, entertained and amused them most was the hero of the hour. They did not discriminate very carefully between the eloquence of the forum and the eloquence of the hustings. Human nature ruled in both alike, and he who was the most effective speaker in a political harangue was often retained as most likely to win in a cause to be tried or argued.

And I have no doubt in this way many retainers came to Lincoln. Fees, money in any form, had no charms for him; in his eager pursuit of fame he could not afford to make money. He was ambitious to distinguish himself by some great service to mankind, and this ambition for fame and real public service left no room for avarice in his composition. However much he earned, he seemed to have ended every year hardly richer than he began it, and yet as the years passed fees came to him freely: One of \$5,000 is recorded—a very large professional fee at that time, even in any part of America, the paradise of lawyers. I lay great stress on Lincoln's career as a lawyer—much more than his biographers do—because in America a state of things exists wholly different from that which prevails in Great Britain. The profession of the law always has been, and is to this day, the principal avenue to public life, and I am sure that his training and experience in the courts had much to do with the development of those forces of intellect and character which he soon displayed on a broader arena.

## THE COURT OF CLAIMS.

THE Court of Claims, having disposed in two sittings of the majority of the claims for the performance of services at the Coronation, which has now been fixed to take place on June 26 next, will not resume its labors until January 11. It is one of the most ancient tribunals in the land, its records dating back to Richard II. The Sovereign was once accustomed, shortly after his accession, to issue a warrant appointing the Lord High Steward sole judge of the Court; but in later times the duty of determining claims has been committed to certain members of the Privy Council, and this course has been followed on the present occasion. By the proclamation of June 26 last the King dispensed with many services performed on former occasions, with the result that the labors of the Court of Claims have been considerably lightened. The jurisdiction of the Court is limited to claims involving the right to perform services at the actual ceremony, and all claims relating to the procession, as well as those dependent on the King's pleasure, have been dismissed. What, perhaps, is the most important claim will not be settled by the Court. The rival claims of the Earl of Ancaster, the Marquis of Cholmondeley, the Earl of Carrington, and the Duke of Atholl to the office of Lord Great Chamberlain have been referred to the Committee of Privileges of the House of Lords.

The services with which the Court is empowered to deal are known as "Grand Serjeantry." This is defined by Littleton as "where a man holds his lands or tenements of the Sovereign by such services as he ought to do in his own person, as to carry the King's banner, or his sword before him at the Coronation, or to be his carver or butler." Many of the claims have reference to services which modern life has rendered very trivial. One claim, for instance, relates to

the preparation in the King's kitchen of a mess of porridge, while another relates to the holding of the towel when the King washes his hands after dinner on his Coronation Day. This first of these quaint privileges is claimed by the holder of some land at Addington, in Surrey, while the second is attached to certain lands at Heydon, in Essex. But there are other services which, though little more, from a utilitarian point of view, can be claimed for them, yet have a symbolical character which renders their retention most desirable. The Orb, for instance, is an indication of Imperial authority; the Three Swords represent mercy, and spiritual and temporal justice; and the Golden Spurs are an emblem of the source of knighthood. These symbols play an important part in the ceremony, for their presence speaks eloquently of the historic past, and has a message even for our own time. Behind all the claims, however curious and trivial, a certain usefulness may be recognized, and even those who are not mere antiquarians may rejoice that as many of the quaint old services as possible are to be retained.

Few of the claims submitted to the Court have, so far, been admitted, many having been dismissed for want of jurisdiction, and others postponed until the Commissioners resume their labors. The Dean and Chapter of Westminster had no difficulty in establishing their right "to instruct the King and Queen in the rites and ceremonies, to assist the Archbishop of Canterbury, and to have cloth, etc., for fee," the same order being made as in 1838. The Duke of Newcastle and the Earl of Shrewsbury put forward competing claims "to provide a glove for the King's right hand and support His Majesty's right arm while he is holding the sceptre." This right was attached by charter of King Henry VIII. to the Priory of Worksop.

That priory was granted to the Earl of Shrewsbury, and was vested in his family for a long time, but eventually passed away by the marriage of an heiress. The lands came later into the hands of a former Duke of Norfolk, who performed the service at the Coronation of Queen Victoria, and they afterwards passed to the Duke of Newcastle. The original grant was to the Earl of Shrewsbury, "his heirs and assigns," and the Duke of Newcastle, as assignee of the grantee of the charter, claimed to stand on exactly the same footing as did the Duke of Norfolk at the last Coronation. The Court, in these circumstances, decided in favor of the Duke of Newcastle's claim, and dismissed that of Lord Shrewsbury.

The Earl of Erroll succeeded in establishing his claim "to walk as Lord High Constable of Scotland, and to have a silver baton, tipped with gold at each end, with his Majesty's arms at one end and his own at the other"; but the Court declined to say who must provide a new baton, the one used at the last Coronation having been lost. Equally successful was the claim of the Duke of Argyll "to carry the rod or baton of his office of the Heritable Master of his Majesty's Household of Scotland, to have fees, etc., and to be permitted the attendance of the proper officer of the Household." The Walker trustees desired "to exercise the office of Usher of the White Rod of Scotland by deputy," and their claim was allowed, though they were unable to specify the duties of the ancient office. Sir James Balfour Paul (Lyon King of Arms of Scotland) claimed "to be assigned customary place at the Coronation for himself and his heralds and pursuivants," and his claim was also admitted, though he was no more able than the Walker trustees to define the duties he would perform at the ceremony. The applications of Sir Arthur Vicars (Ulster King of Arms) and Mr. Henry Claude Blake (Athlone King of Arms) "to be assigned usual place at Coronation, and have all advantages

appertaining to their respective offices," were granted by the Court, the Lord Chancellor saying to the applicants, "You have, I think, established your right to be present at the ceremony, but this Court cannot say anything about your duties." These were all the claims which, apart from those postponed to the next sittings, the Court deemed itself competent to allow. For the office of Hereditary Standard-bearer of Scotland there were three claimants—viz., the Earl of Lauderdale, Mr. Henry Scrymgeour-Wedderburn, and the Rev. R. C. Scrimgeour. The Court, after listening to lengthy arguments, reserved its decision in this case.

One of the most interesting claims which did not meet with success was that advanced by the Barons of the Cinque Ports. Mr. Inderwick, K.C., who supported the claim of the Barons to be assigned a station within the Abbey in attendance on the King, presented a petition, signed by the Marquis of Salisbury, as Lord Warden of the Cinque Ports, which stated that from time immemorial they have been accustomed, at the Coronation of the Kings of England and Queens Consort, "to carry over the head of every of the said Kings and Queens a cloth, called a canopy, of gold or purple silk, borne upon four lances or staves, ornamented with silver-gilt bells; that sixteen of the said Barons were appointed to each King's canopy, and that a similar canopy was borne over the head of the Queen Consort by other sixteen Barons of the said Ports; that the said Barons were accustomed to have and take the said canopy or canopies, staves and bells, for their own use, and to dine, on the day of the Coronation, at a table in the great hall (where the King or Queen was accustomed to dine), at the right hand of the King or Queen; that the said Barons in pursuance of their right of personal attendance upon the Sovereign at his Coronation, have, from time immemorial, armed and in their liveries, met him as he came forth of his chamber in the Palace of Westminster and conducted

him under their canopy from the said hall to Westminster Abbey, and in the Abbey through the nave as far as the entrance to the choir, where the said Barons remained until the conclusion of the service in the choir; and that when the King came forth of the choir the said Barons conducted him under the said canopy down the nave and back to the hall, where they quitted his Majesty at the foot of the steps leading to the raised platform upon which the royal tables were set." The Barons of the Cinque Ports, though successful in proving their right to carry a canopy at the Coronation, did not achieve their purpose, for the Court decided that their claim depended upon whether a canopy was carried over the Sovereign in the procession or not, and that if there was no canopy to be carried they had no right to be present. Whether a canopy will be carried is dependent upon the pleasure of the Sovereign, and the application of the Barons of the Cinque Ports belonged, therefore, to the numerous category of claims with which the Court has no jurisdiction to deal, the duty of the Commissioners being to determine only questions of right.

Want of jurisdiction was the ground on which the Court declined to allow the claim of Mr. Frank Dymoke to be Champion of England, the hereditary office in respect of which his family hold the manor of Scrivelsby in Lincolnshire. The Champion's challenge has never been made at the Coronation ceremony, but at the subsequent feast in Westminster Hall, generally between the first and second course. Hence the Court, which, as we have said, is concerned only with services at the actual ceremony, could do no more than record his claim. The claim to perform the office of herb-strewer put forward by Miss Beatrice Fellowes, who is the great-granddaughter and senior family representative of Mr. William Fellowes, who discharged the duties at the Coronation of the late Queen, was dismissed because it related to the procession, as to

which the Court has no jurisdiction. Not more successful was the petition of the governing body of Westminster School that "the King's scholars may be present in the Abbey and acclaim their Majesties, and that the Town Boys may be present," although it was represented by the headmaster that "in every Coronation of all the Kings and Queens of England the King's scholars have been present; that such immemorial usage was ratified by James II and admitted at every subsequent Coronation; and that the Town Boys have also been wont to attend, and that the custom was recognized by George IV. and all his successors." Sir A. H. Seton-Steuart, of Touch, claimed to exercise the office of Hereditary Armor-bearer to the King and Esquires of the Royal body, an office said to have existed before 1448. No such duty, it appeared, was discharged in 1838, and the claim was refused. A similar fate awaited Sir Harry Paul Burrard's application for the office of Bow-bearer. A claim by the Earl of Shrewsbury "to be present in respect of the office of Lord High Steward of Ireland and carry a white staff as such" met with only a qualified measure of success. The office was created in 1446, but permission to carry the white staff was granted only in 1871. The Court was not prepared to affirm the right as prayed, but merely decided that if Lord Shrewsbury were summoned he might carry the white staff.

Many other applications were excluded by the inability of the Court to entertain claims not resting on right, among them the claim of Mr. G. T. J. Sotheron-Estcourt, as owner of the manor of Shipton Moyne, to perform the duties of Chief Larderer; the claims of the Duke of Norfolk, Lord Mowbray and Stourton, and Mr. Frederic Oddin Taylor to act as Chief Butler of England; the claim of the mayor, alderman, and citizens of Oxford to attend as Assistants to the Chief Butler; the claim of Miss E. S. M. Wilshere "to serve the King on the day of the Coronation with the first cup, being a silver cup,

gilt, of which the King shall drink at his dinner, and to have the same cup for her fee"; the claim of the Hon. Corps of Gentlemen-at-Arms to carry up the courses at the banquet; and the claim put forward by the headmistress and scholars of the Grey Coat Hospital to be present at the ceremony. These petition like many others dismissed by the Court, will more properly come before the Executive Council responsible for the arrangements of the Coronation ceremony. Though there are three claimants for the office of Chief Butler, the claims to several analogous offices do not appear to have been revived. The duty of the Chief Larderer, an office held for centuries by the Earls of Abergavenny, was to take charge of the larder. He received as a fee "the remainder of all beeves, muttons, calves, venisons, cheverels, lard, and other flesh, fish, salt, etc., remaining after dinner." The office of carver—the duties of which were discharged by himself or deputy—once belonged to the Earl of Lincoln; while the privilege of the Grand Panneter—an office attached to the manor of Kibworth Beauchamp, in Leicestershire—was to preside over the pantry, and to have the "salts, knives, and spoons as his fee."

None of the claims made on behalf of municipal bodies, some of ancient and others of modern origin, have at present been recognized by the Court. The sheriffs of the

City of London petitioned "to be allowed to walk in the procession, and have such precedence as has hitherto been assigned to them." The sheriffs admitted that they did not exercise the right at the Coronation of Queen Victoria, but urged that they enjoyed the privilege at the Coronation of George IV., but the Court refused to entertain their claim. The claim of the Mayor and Commonalty of the City of London "to attend and bear the crystal sceptre or mace, etc., and have certain fees," has yet to be heard, the visit of the Prince of Wales to the city rendering it impossible for the Recorder and Common Serjeant to attend the Court on the day appointed for its hearing. The Lord Mayor, alderman, and citizens of York claimed to be represented at the Coronation, a claim which they supported by a precedent of considerable antiquity. Richard III. was crowned at York, and in consideration of services rendered on the occasion the Lord Mayor of York was appointed Chief Serjeant-at-Arms, at a salary of twelve pence per day. The Court was not, however, influenced by this precedent, and held that the claim was not established as of right. Claims to be represented at the ceremony were made by the mayors, aldermen, and councillors of the boroughs of Camberwell, Hackney, and Hampstead; but these modern officials were not more successful than their ancient brethren of York.—*The Law Journal*,



## A LAWYER'S STUDIES IN BIBLICAL LAW.

## THE PATRIARCHAL FAMILY.

BY DAVID WERNER AMRAM.

THE patriarchal family system, although by no means the only system known to the ancient Hebrews, is the one which exercised a dominant influence in the development of the Biblical Law of Domestic Relations. An excellent introduction to the study of this branch of the Biblical law may be found in Sir Henry Sumner Maine's "Ancient Law"; an epoch-making book in its day, and although it is the result of a study of Aryan legal institutions it is likewise of the greatest value in the study of Semitic legal institutions. And it is true, also, that the student of Maine's book will not only be helped by it to understand the Biblical laws, but will understand it more clearly through his knowledge of the Biblical law, which will serve to give point to many abstract propositions, and fill out many a gap in Maine's argument. There are many points of similarity in the laws and institutions of ancient peoples, and the distinctions based upon supposed racial differences are largely imaginary and the result of the theoretical studies of closet philosophers.

The fundamental differences between the patriarchal system and the system of to-day is summed up by Maine in the phrase, "The unit of ancient society is the family and of modern society, the individual." The patriarchal family takes its name from the patriarch or eldest male parent in the family. He was the supreme head, and the family, consisting of the wives, children, kinsmen, slaves, and inanimate property, was the little kingdom subject to his rule. The families of Terah and Abraham are typical examples. Terah, the father of Abraham, Nahor and Haran, was the head of a patriarchal family group, the Terahites. His son, Abraham, although a married man, and even his grand-

son Lot, likewise married, and the father of a family, were, nevertheless, members of the family of Terah (Genesis XI, 27-31). Upon the death of Terah, Abraham became the patriarch, and then we find that Lot, who was Abraham's nephew, remained with him as a member of his family and submitted to his supremacy until force of circumstances compelled them to separate (Genesis XII, 5; XII, 1-11). Even after separating so as to keep their quarreling herdsmen apart, Lot removed but for a short distance from Abraham; and when Lot was made a prisoner of war after the battle in the Vale of Siddim, Abraham promptly performed his duty as kinsman and head of the clan, and went to his rescue.

The patriarch Abraham was supreme in the government of his household. He had the power of life and death over the members of his family. He set out to kill Isaac his son, he divorced and cast away Hagar his wife, and sent her and his son Ishmael into the wilderness. The children of the patriarch and his house-servants "born in his house" seem to have had the same legal status. The fact that Ishmael was the son of the bondwoman Hagar did not seem to alter his legal status, and it was Sarah's fear that he would inherit together with Isaac her son that led this imperious woman to insist upon the dismissal of Hagar and her child. It will be seen that Abraham's compliance with her wish was not really because of the lower status of Hagar and Ishmael, but on account of the greater influence which Sarah wielded over him. Before Abraham had any children, Eliezer of Damascus, "a son of the house," was his heir apparent.

When the patriarch died his possessions

were divided among his sons, the first receiving a larger share as his birthright, but generally endowed with no other advantage than an honorary precedence. The internal affairs of the patriarchal family were originally beyond the influence of public law. Each family was an independent little state represented by its head, the patriarch. The convention, or congress, of such patriarchs belonging to the same clan or tribe, became the Councils of Elders or the "Heads of the Houses" that are frequently mentioned in the Bible. These bodies met for the purpose of discussing matters pertaining to the common welfare, but not for the purpose of regulating or in any way interfering with the internal affairs of the family which remained solely under the control of its own head, the patriarch. In course of time, as public opinion concerning the proper regulation of the rights and duties of the members of the family crystallized, public law began to interfere with the affairs of the family.

The patriarchal family, like the modern corporation, was immortal. When the patriarch died the family continued; the temporary head had passed away, and another took his place. Great care was taken to prevent the family from becoming actually extinct, and its existence was guarded by various enactments such as the Law of the Levirate Marriage and the Law relating to the Marriage of Heiresses. The former (Deuteronomy XXV, 5-10), provided that where one died, leaving a widow, but no children, it became the duty of his brother to marry the widow, and her first born succeeded to the name of the brother who had died, so that "his name be not put out of Israel." This did not mean that the name of the deceased individual should be preserved, but that by a legal fiction the family of which he was the representative, should be preserved. The law of the Marriage of Heiresses (Numbers XXXVI, 8), provided that daughters possessing an inheritance must marry within the family of

the tribe of their father. At this stage of the history of the law the tribe was considered the larger family, within which the inheritance must remain.

The union of all the members of the family under the supremacy of the patriarch resulted in the strengthening of family solidarity, so much so that the act of any member of the family was deemed the act of all, a theory that was extended from the family to the clan, then to the tribe, and eventually to the entire Jewish nation. Each of these political bodies was composed of persons who claimed a common ancestry, and who were united not only by the ordinary social and political bonds, but also by the ties of blood.

Originally this theory of responsibility was literally understood, and when a man committed a crime his children and even his grandchildren suffered for it, for the crime was a corporate act, not merely the act of the individual, who was the agent. This system gave rise to the blood feuds. Kinsmen naturally sided with their own blood in such quarrels, and the lines of division between the contending parties were drawn as tight as those between the rival houses of Montague and Capulet. Children were punished for the crimes of their parents, and parents were punished for the crimes of their children. When any member of the family suffered a wrong, it became the duty of the others to redress and avenge it.

This theory of solidarity also affected the nature of the property rights of the family. As the patriarch was merely the temporary head of the family, which theoretically continued to exist after his death, and as his possession of the property was more in the nature of a trust for the benefit of the family than an actual ownership, he could not divert the property from the family by giving it away or selling it to another. In the very early history of the patriarchal system, the patriarch was undisputed master. He was the head of the family because he was the oldest and strongest, and he had a right

to do as he pleased with his own. He made the law for his family as his caprice or sense of justice dictated. How this irresponsible, petty ruler became bound in a mesh of customs, traditions and laws, forms an interesting chapter in the history of the growth of public law. Religion, love of children, ties of blood relationship, ownership of land, self-defence,—these were some of the influences that gradually built up a system of customary law which could not be broken, even by the theoretically autonomous, irresponsible patriarch, and in the earliest recorded history of the patriarchal system in the Bible, we find that the patriarch no longer enjoyed the unrestricted right to dispose of the property of the family. Custom had limited his powers. Once established, this conception of the inalienability of the family property became a fundamental principle of law; and, in the Mosaic code, we find it often referred to, and several times the subject of special legislation. The institu-

tion of the Jubilee was intended to check a tendency which had arisen to dispose of the family inheritance to strangers by providing (Leviticus XXV, 10-23) that in the year of the Jubilee the land should revert to the family which had originally owned it. This law is of comparatively late origin, when the notions of family solidarity were beginning to break down after Israel had ceased to be a federation of tribes, and had become a nation with world problems to solve. Commerce and international intercourse were working for the liberation of the individual from ancient social and legal regulations, but the conservative instincts of the people were reactionary; and the law expressing this conservatism sought to prevent the broader union of men founded on a basis of national territorial possession from destroying the ancient family solidarity which had been preserved largely through the restraints on alienation of the family estates.

## JUDICIAL OATHS IN ANCIENT IRELAND.

BY JOSEPH M. SULLIVAN.

THE history and origin of the judicial oath is a subject involved in almost hopeless obscurity. Owing to a lack of profound knowledge of ancient and modern Gaelic, the translators of the Brehon Laws furnish the legal antiquary with no knowledge of the history and origin of the judicial oath in ancient Ireland. The oath itself, and the manner of administering it, are not stated in the translation of the Brehon Laws. We are certain that our Irish ancestors did swear, and were accustomed to the use of oaths in judicial proceedings. We also know that before the introduction of Christianity into Ireland, the Druids swore on solemn occasions by invoking or calling to witness the

elements of nature, namely, the sun, moon, wind, dew, crops, and the heavenly planets.

After the introduction of Christianity into Ireland by St. Patrick, we find that oaths were administered on holy relics, sacred shrines, and on bishops' crosiers. Oaths taken on holy relics and at religious shrines were considered very solemn and binding. Again, the place where the oath was administered, as, for instance, an oath taken at the altar or in the temple, was supposed to give it additional value.

There was also a triple oath which was administered in this manner, namely, the affirmant swore first standing, then lying, then sitting. I have been unable to learn



at what ceremonies or state occasions the above oath was used.

Another peculiar form of oath was the one which was taken at the grave of the affirmant's dearest relation. The writer has been unable to learn the origin of this oath, but is strongly of the opinion that it is of pagan origin.

In O'Clery's "Annals of the Four Masters," we find that Ugaine Mor, before his death, *anno mundi* 4606, "exacted oaths, by all the elements visible and invisible, from the men of Erin in general that they would never contend for the sovereignty of Erin with his children or his race."

Oaths in Ireland have invariably been of two kinds, the judicial and extra judicial. In the judicial oath the affirmant invokes the pains and penalties of perjury in case he speaks falsely; in the extra-judicial oath, the affirmant invokes the Divine vengeance in case he speaks falsely. A man taking a false extra-judicial oath does not incur the pains and penalties of perjury; he commits a sacrilege, and stamps himself as a moral delinquent.

Oaths have been universally respected in Ireland. In no country in the world is an informer more abhorred and detested. How can language in its poverty paint the wretch who "takes his perfidy to Heaven and seeks to make an accomplice of his God. From the day when Judas, that distinguished informer of antiquity, seized with remorse, threw away his blood-money, and hanged himself, informers have been universally loathed and despised."

The Celtic mind has always had a distinctive leaning towards the mystical and the supernatural, and the various ruins of raths

and cromlechs are manifest evidences of the religious observances of the Druidical priests, who were a powerful influence in the days of old.

A people who dwelt in this "*ultima thule*" of Horace, and were imbued with such an intense religious fervor, must have had a regular system of religious oaths as well as civil.

Long before the English system of jurisprudence had been formed from the inchoate mass of early legal maxims, we find a complete system of legal ethics in early Ireland, and this also shows that the judicial oath was known and observed there.

The cultured Greek writers spoke of this land as an island rising out of the sea, the fairest and most beautiful of all the sea's productions, and were wont to bestow upon it the appellation of "Ogygia," "the most ancient land."

When Greece, the home of philosophy and art, produced writers who thus referred in terms of affection to this modern "Niobe of Nations," and placed on record their belief in its history of antiquity, we can very easily deduce the inference that literature and art and legal lore flourished there in the very earliest days, and oaths, as well as other observances, were in vogue.

If a magic wand could dispel the clouds that enshroud the past of romance and literature, antiquarians would revel in a field of delightful research. In the present revival of the study of ancient Celtic lore and history and language, literateurs the world over are looking forward with hope and cheer, in the conviction that these researches will be crowned with glorious success.

# The Green Bag.

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor,  
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

*The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.*

IN the March number of THE GREEN BAG will appear an article of considerable length entitled "The Proceedings in the case of Rear Admiral Schley and in other Inquiries by Military Courts," by Charles E. Grinnell, Esq., of Boston, whose interesting analyses of the Bram case,<sup>1</sup> the Maybrick case,<sup>2</sup> the Eastman case,<sup>3</sup> and other cases,<sup>4</sup> will be remembered. Mr. Grinnell will comment upon the Schley Court of Inquiry from a legal point of view. Not undertaking to argue the facts of the case, he will discuss the difference between the methods of Courts of Inquiry and those of Civil Courts, the reasons for such methods, and their comparative values in arriving at knowledge of facts and trustworthy opinions. Systems of military order will be compared with principles and practices of legal justice. Relations of open Inquiries to political expediency will be considered.

JUDGE M. ARNOLD, of Philadelphia, the trial justice in the Holmes murder trial, which was the subject of a recent article<sup>5</sup> in THE GREEN BAG, in a recent letter writes as follows concerning that interesting case:

"I thank you sincerely for the GREEN BAG, with Mr. Chapin's excellent article on the Holmes case, which afforded me much pleasure in reading it. He fell into a trivial error when he quoted the official title of the Court as being in and for the city of Philadelphia, when it should be city

<sup>1</sup> THE GREEN BAG, April, 1897.

<sup>2</sup> The Harvard Law Review, February, 1900.

<sup>3</sup> "Eastman's Word Taken,"—The Boston Herald, May 12, 1901; and "Anglo-Saxon Legal Justice,"—The Boston Evening Transcript, May 25, 1901.

<sup>4</sup> "Modern Murder Trials and Newspapers,"—The Atlantic Monthly, November, 1901.

<sup>5</sup> "A Study in the Fine Art of Murder," by H. Gerald Chapin, THE GREEN BAG, vol. xiii, p. 515; November, 1901.

and county, although the word city is superfluous, while the word county is material, the Court being a County Court and there being no city Criminal Court.

"There are some things in the case which may be read between the lines by those who were present at the trial, while the cursory reader would not notice them. For instance, the belief of the prosecution was that Pitezel was drunk on the morning he was poisoned, but could not prove it. There was proof that he bought a quantity of whisky the night before, and took it home, but nothing beyond that. The prisoner asked the coroner's physician whether he was prepared to give a professional opinion that one-half hour before he died or at the time of his death, he was not in an insensible condition from the excessive use of alcohol. The question and the manner of putting it, as well as the person who asked it, convinced every one present that Pitezel was drunk, and that Holmes took advantage of his condition to chloroform him; p. 151. On p. 369 he, while examining Miss Yoke (his wife, although their marriage was unlawful) proved that he was away from home from ten-thirty to three or four o'clock the day of the murder, and that when he came back he was nervous, prostrated, and excited, his underwear being damp from perspiration, and that he told her they would leave that evening, although they had not agreed on leaving before he left home that morning."

THE serious character of the defects of the "Proposed Penal Code of the United States" are increasingly apparent the more the bill is studied. In our January number, Mr. Speranza pointed out serious objections to the proposed legislation; and opposition to the bill is reinforced by the recently published report of a committee of the Association of the Bar of the City of New York.

Referring to Chapters I to X of the proposed code, which are supposed to revise title LXX.—

the "Crimes" title of the Revised Statutes — the committee points out that the principal objects to be achieved were, first, the simplification of existing laws by framing general statutes covering, as far as practicable, all instances of the same offence, and, secondly, providing a uniform system of punishment for similar offences. As to the first of these objects, the report says, pointedly, that "the Commissioners appointed to revise and codify the penal laws of the United States have neither revised nor codified. They have merely reprinted." This sharp criticism is supported by detailed references to sections of the proposed code. And further references cited by the committee show the failure of the Commissioners to carry out the recommendation of the Attorney-General for a uniform system of punishment. The report further points out numerous serious defects of bad grammar and of prolixity which the proposed code perpetuates, instead of correcting.

The report criticises also the first six subdivisions of Chapter XI, which include the proposed complete code of common law and statutory offences, committed in places within the exclusive jurisdiction of the United States, or upon the high seas, or upon vessels of the United States in any waters, and holds that the present system, — established in 1825 at the suggestion of Mr. Justice Strong, under which in the matter of ordinary offences usually punished by the State courts, the respective State laws are extended over the Federal property in each state, — is far preferable to the proposed system. And this opinion of the Commissioners is enforced by the consideration in detail of many of the provisions of the proposed code.

Summing up their conclusions in respect to the proposed penal code, the committee reports:

"First: In revising the "Crimes" title of the present Revised Statutes of the United States, the Commission has ignored the recommendations of the Attorney-General in 1896, pursuant to which the Act of Congress authorizing the Commission was passed, (1) to prepare a new crimes act, containing provisions simple, easily understood, and general in their scope, covering the whole subject matter of that title, and (2) to provide for a uniform system of punishments.

"The Commission, in the proposed code, has done little more than shuffle about the chapters

of the present revision and re-number the sections, thus increasing existing confusion.

"Such a nominal revision, if enacted, will not improve the existing conditions of the law, and will postpone indefinitely the passage of a proper crimes act.

"Your committee therefore condemn *in toto* all this part of the proposed code.

"Second: (1) Your committee consider the proposed great extension of Federal criminal legislation over the whole field of common law and statutory crime, within the territorial and maritime jurisdiction of the United States, to be unnecessary and very unwise.

"(2) But if the policy of this proposed extension of Federal criminal legislation should be approved, your committee consider the proposed code to be very defective on points of the greatest importance,"

The recommendations of this report, backed by some of the leaders of the New York bar, who served as members of the committee, merit the serious consideration of Congress.

In the death of Dr. Bernhard Getz, Norway, and, in fact, Europe, has lost one of its most noted law writers of recent times. He was born in the ancient cathedral city of Throndhjem, Norway, in 1850, in which city he attended the Latin School, entering the University at an early age, where he made a record for himself as a student. On graduation he became professor in law at the capital city, and a few years later D. LL. was conferred upon him by the University of Denmark. In 1876 appeared his first law treatise on "A Party to the Crime," which at once placed him on a high pinnacle with the jurists of his country. This was followed by a work on "Appeal to Higher Courts," in 1884. During the year 1885 appeared another work from his pen, called "Changed Form of Process in Criminal Law," which showed scholarly attainments and a thorough knowledge of the subject matter dealt with. In 1889, together with Prof. F. Hagerup, he published "A Commentary on Criminal Law," which since its publication has been a standard work in Norway. When the jury system was introduced, he became Rigs Advokat (States Attorney), which office he held till the time of his death, October 31, 1901.

It was not as orator or teacher that he was best known, but as a writer on law subjects and as one who suggested, formulated and proposed law reforms. He was conservative, just and honorable, and hence attracted leaders of all parties, who saw in him a person with a mission, with an eye for the good of the people. Both from travels, and from study at home and abroad, he became a man of scholarly attainments, of classic taste, familiar with the laws and institutions of nearly all the European countries. He had sounded all the depths of the criminal law and was in the midst of the civil law when he was called away in the prime of life by heart failure, from which he had been a sufferer. Dr. Getz was a pleasant companion, generous to a fault, magnanimous to his rivals, a trusted friend and full of enthusiasm for his life-work, that of the law.

#### NOTES.

IN 1858, during the senatorial campaign of Illinois, when Abraham Lincoln was canvassing the western part of the State, he made a speech at Rushville, in Schuyler County, which was reported by a young lady who wrote occasionally for the local paper, the *Schuyler Citizen*. As an introduction to her report of the speech, which appeared in the next number of that journal, she said:

"So many people had told me that Mr. Lincoln was a miracle of homeliness, that I expected to see the ugliest man in Illinois. Instead of that, I saw a man whose face lit up in a most extraordinary way, when he talked, and I don't care what anybody else's opinion is, I want to say that I consider Mr. Lincoln one of the handsomest men I ever saw."

A copy of the paper, with this paragraph carefully marked, was sent to Mr. Lincoln. He took it at once to his wife. "Mary," he said, "I have always thought until now, that you were the only woman on earth, who considered me a handsome man, and I have not been absolutely certain about that, but it seems there is one other."

A DUTCHMAN on a witness stand was asked what ear-marks the pig had that was in dispute.

"Vel, dot pig he have no ear-marks, except a very short tail," was the reply.

GOVERNOR SHAW of Iowa, the new Secretary of the Treasury, last year set apart a special Thanksgiving Day for one little girl, Mary Zigrang, of Livermore, because she happened to be ill on the twenty-eighth day of November. Mary wrote her first letter to the governor without consulting her parents. It read:

*Dear Governor:* Please can we have another Thanksgiving Day and have it next Thursday? I was sick and could not eat any turkey or other good things. I ain't very big, but I like turkey. Please let us have it.

Your friend, MARY ZIGRANG.

To this the governor not only acceded promptly, but also sent by express a large turkey that Mary might be well cared for. His official proclamation for the benefit of Mary Zigrang of Livermore had attached to it the seal of the State, and all other red tape necessary to lend it authority. The proclamation issued by the governor was as follows:

Having been informed that Mary Zigrang of Livermore, Iowa, was ill on the twenty-eighth day of November, 1901, and was thereby prevented from joining in the festivities incident to Thanksgiving Day, I, therefore, recommend that, at a convenient hour, on Monday, December 9, 1901, Mr. and Mrs. Zigrang, together with their family and such young friends as Mary may choose to invite, assemble in the family dining-room, there with thankful hearts for country, home, and the blessed influence of children, to partake of such bounties as are usually served in Christian America on the day appointed for national Thanksgiving, and that special attention be given that Mary shall be bountifully supplied with that portion of the national bird and such other delicacies as may be most congenial to her.

LESLIE M. SHAW, *Governor of Iowa.*

Signed at Des Moines this sixth day of December, 1901.

Next week came the reply from Mary to the governor, closing the incident.

*Dear Governor:* I thank you for your kind letter, and for letting me have a Thanksgiving Day of my own, and for the nice turkey that you sent me. I shall always keep your letter. It came too late for me to send you an invitation. I wish you could have been here. You are a nice, good man, and I wrote Santa Claus to bring you something nice for Christmas.

Your friend, MARY ZIGRANG.

AMONG the stories told of the late Lord Russell of Killowen is the following, printed in *The Westminster Gazette* :

In the autumn of 1897, Lord Russell had finished the Assizes at Hereford, and, being a keen horseman, he took the idea of riding to Shrewsbury through the lovely Stretton Hills, and thence taking train to London. He arrived at Church Stretton very tired, and asked at the hotel for a private room, where he could rest for a few hours before resuming his ride to Shrewsbury, thirteen miles further on. The manageress declared the hotel was full to overflowing, and that she could not give him a private room, though she would gladly provide him and his horse with whatever refreshment they needed. He declined the offer, and on being informed that the next village, Leebotwood, was only three miles away and boasted of a good inn, he decided to proceed there.

Arriving there tired, dusty, and in by no means a good temper, Lord Russell called the landlady, an independent, democratic Welshwoman, told her he was the Lord Chief Justice of England, and that he required bait for his horse, food for himself, and a private room where he might sleep undisturbed for a few hours. Now Church Stretton, in addition to its natural beauties, possesses two large private asylums for males and females respectively. The landlady was reminded of this on beholding an angry, dust-stained, untidy man who called himself the Lord Chief Justice of England. She probably considered that if he was the personage he represented himself to be, he should travel in a coach with outriders, and wear a full-bottomed wig and ermine-trimmed robes. So she took him to be a fugitive from Stretton House, and proceeded to treat him accordingly. She told him he could have some tea and fresh boiled eggs for refreshment. "I see a nice ham there," said Lord Russell. "That's not for the likes of you," replied the hostess. "That's for to-night's lodge"—an allusion to the local lodge of a friendly society which met at her inn.

Lord Russell could not succeed in getting even one slice of the ham; so, having eaten his eggs and drunk his tea, he laid himself down for a rest in her parlor. His lordship was just dozing to sleep when the landlady remembered

that certain family treasures lay unguarded within the stranger's reach. So she bustled into the room, rummaged among drawers, and retreated triumphantly with some silver spoons, her marriage lines, and the first cuttings of her boy's hair. Lord Russell bore the intrusion meekly enough for him, and, when she had left, resumed his sleep. But not for long. The landlady suddenly felt misgivings about her presentation clock (from the lodge to her husband), which ticked placidly on the mantelshelf. She burst in on his slumbers once more and carried off the clock, with as much haste and dignity as its great weight would allow.

This was more than Lord Russell could bear. He jumped up, rated her soundly for her disturbance and ill-treatment, called for his horse, and stated that on reaching Shrewsbury he would report her to Captain Williams Freeman. Now Captain Williams Freeman is (or was then) Chief Constable of Shropshire, and the mention of his name was not without effect on the license-holder. "I told you I was the Lord Chief Justice of England, and there is my name for you to remember," thundered Lord Russell, handing her his card. She looked at it and said, "Well, you ought to have come here as a lord, and not like a dusty tramp!" Lord Russell rode on to Shrewsbury, and I suppose the humor of the situation dawned on him, because the landlady suffered no annoyance from the Chief Constable; and she now treasures the Lord Chief's card with the silver spoons, her marriage lines, and the first cuttings of her son's hair.

THE above tale recalls to *The Law Times* the good story told by O'Connell concerning Lord St. Leonards, who, when Lord Chancellor of Ireland, was fond of visiting lunatic asylums. The Lord Chancellor made an arrangement with Sir Philip Crampton, the Surgeon-General, to visit, without any previous intimation, a private lunatic asylum at Finglas, near Dublin. Some wag wrote to the asylum that a patient would be sent there that day, "a smart little man who thought himself one of the judges or some great person of that sort," and he was to be detained by them. The doctor was out when the Lord Chancellor arrived. He was very talkative, but the keepers humored him and answered all his

questions. He inquired if the Surgeon-General had come. The keeper replied: "No; but he is expected immediately." "Then I shall inspect some of the rooms till he arrives." "Oh, sir," said the man, "we could not permit that at all." "Well, then, I will walk awhile in the garden." "We cannot let you go there either," said the keeper. "What!" said he; "don't you know I am the Lord Chancellor?" "We have four more Chancellors here already," was the reply. He got enraged, and they were thinking of a strait waistcoat for him, when luckily Sir Philip Crampton arrived. "Has the Lord Chancellor come yet?" said he. The man burst out laughing, and said: "Yes, sir, we have him safe; but he is by far the most violent patient in the house."

WHEN Senator J. P. Dolliver's first child was born both houses of Congress adjourned, a remarkable occurrence and one of which the young miss will have occasion to boast all her life.

That was a couple of years ago and the stork has been expected to visit the Dolliver home, at Fort Dodge, Iowa, for several weeks past. Senator Dolliver was extremely anxious for a son to perpetuate his work in making history in this country, and had planned a roseate future for Dolliver junior.

Senator Dolliver's boon friend in his home town is Tom Healy, a State senator and Iowa politician of considerable influence and reputation. Senator Healy is given to "jollyng" the junior senator from Iowa, and teased him by declaring his faith in the belief that the second child would be another girl.

Recently a second child was born to Senator and Mrs. Dolliver at their home in Fort Dodge. The day before the event the senator was so certain the new comer would be a son, and Senator Healy was so strong in his opposition that a wager was made, a supper being at stake on the sex of the new comer. If it proved to be a son, then Senator Healy was to feast Senator Dolliver; if a daughter, then *vice versa*. Senator Dolliver was serene, however.

The new comer proved to be a girl. Senator Dolliver sent word to his friend:

"It's on me, come over as planned. The boy is a girl."

"YOUR domestic relations are in a bad way," said the judge to a respondent in a separate support case.

"Oh, no," answered the respondent, "my domestic relations are all right, it's my wife's relations that cause all my trouble."

COURT (to prosecutor): "Then you recognize this handkerchief as the one which was stolen?"

PROSECUTOR: "Yes, your Honor."

COURT: "And yet it isn't the only handkerchief of the sort in the world. See, this one I have in my pocket is exactly like it."

PROSECUTOR: "Very likely, your Honor; there were two stolen."

AN investment in Vermillion County, Ill., land, made sixty-five years ago, by Noah Webster, of dictionary and spelling-book fame, came to light a few days ago by a sale made by W. H. Allen, the grandson of Noah Webster, to U. C. Hill of Henning, a small town near Danville, Ill. Allen, who lives in Farmington, Conn., disposed of his share in the land, eighty acres, for \$87.50, per acre.

Noah Webster, entered the land from the government, in 1836, getting 320 acres, lying two miles from Henning. He died in 1858, leaving four children, among whom the Vermillion County estate was partitioned. A daughter got the eighty acres recently sold. She left the land to her son, W. B. Allen, who came to Danville, a few days ago to close the deal.

The land is virgin soil; and lies covered with prairie grass, just as it did a hundred years ago. While land all around it has been brought to the highest state of cultivation, this land has never known the touch of a plow, and has, although wholly unimproved, earned a large sum on the original investment of \$1.25 per acre.

THE judgment of Solomon was nearly enacted by a civil justice in Georgia in *ante-bellum* days. Two parents claimed the same negro baby, and the evidence was so even that the puzzled judge suddenly thought of the wise king's expedient. He seized the baby, pulled out a bowie-knife from his belt, and proceeded to halve the child. But both claimants reached forward simultaneously, crying, "Boss, don't kill him. You may have him."

ONE of the most marked characteristics of General Benjamin F. Butler was his absolute fearlessness. He was not afraid of anybody and had no reverence for men because of their official station. Upon one occasion he was making an argument before Judge Carter of the Supreme Court of the District of Columbia, who had an irritating habit of interrupting counsel in the course of their remarks, for the purpose of asking a question or making some caustic comment. On the occasion referred to, Butler was citing an English case when he was interrupted by the Court with the remark, that there was plenty of law on the subject without going abroad for it. Pausing for a moment, and looking the judge full in the face, he replied that he was reading from a case that had been well considered and the opinion rendered in clear and convincing terms "without any stump speech being interjected into it," and then went on reading as though no interruption had occurred, and no other was attempted. At another point in the same case he expressed his contempt for one of his legal antagonists, who was also a witness in the case, by saying, "You might as well attempt to light up h—l with a roman candle as to get the truth out of such a witness."

#### LITERARY NOTES.

In his recent volume<sup>1</sup> Mr. Clifton Johnson has done for the Emerald Isles, the same good service which by his earlier books, *Along French Byways* and *Among English Hedgerows*, he had rendered already to rural France and rural England. Like these previous volumes, *The Isle of the Shamrock* is a particularly readable and entertaining account of a jaunt through a foreign land. Part of its charm comes from the freshness of view of the author, who is here setting down his first impressions; part from his simple style; part from his sympathy with his subject and from his keen observation; and part from the natural picturesqueness of Ireland and its people. The numerous illustrations are excellent and add to the attractiveness of the book; the credit for them, as well as for the text, belongs to the author.

<sup>1</sup> THE ISLE OF THE SHAMROCK. Written and illustrated by CLIFTON JOHNSON. New York: The Macmillan Company. 1901. Cloth, \$2.00. (xiv + 258 pp.)

#### NEW LAW BOOKS.

SELECT PLEAS OF THE FOREST. Edited by G. J. Turner. Publications of the Selden Society, vol 13. London: Bernard Quaritch. 1901. Cloth, 28s. (cxxxix, + 192 pp.).

"Robyn slewe a full grete harte,  
His horne then 'gan he blow;  
That all the outlawes of that Forè  
That horne coud they knowe."

So sings the old ballad; and this may well serve as an introduction to a review of this serious work entitled "Select Pleas of the Forest," for indeed almost every page revives one's boyish recollections of Robin Hood. In other words, the volume gives a clear, and hence a lasting and valuable impression, of one phase of mediæval English life.

Like the other publications of the Selden Society, this collection of "Select Pleas of the Forest" does not profess to be of direct value to the practicing lawyer. What does he have to do with old forest laws? He knows—or at least in his youth knew—that the crown used to exercise the prerogative of declaring vast tracts a royal forest, that within these boundaries even the land-owners could not kill game and could not, by cutting down trees or clearing thickets or building houses, impair the fitness of the region to be a home for wild beasts, that these regulations were administered in special courts and under a rather unscientific procedure, and that the results were so objectionable to the great mass of the people as to call for mention in *Magna Charta* and to play a part long afterwards in the ruin of Charles the First.

In truth the lawyer cannot be expected to wish to know more than this. Nevertheless, the lawyer cannot afford to ignore this book, for any educated man, and especially any lawyer, can well spend a few hours in gaining a vivid conception of the actual effect of the doctrine that the king's health was of paramount importance to the realm, and that consequently it was proper, at serious sacrifice of private rights, to devote to the king's use great tracts, many miles in circumference, wherein the king and his guests might enjoy the pleasures of the chase.

The only way to gain an active view of the results of the forest system is to examine this

selection from the records of the actual proceedings of the courts of the forest in the thirteenth century; and the only way to show what interest and value attach to such a book is to give extracts.

Let us begin with a few entries, dated 1209, indicating in a general way the nature of the restrictions imposed by the forest laws and the consequent excitements and inconveniences of life in or near a forest:—

“Let the land of Peter Tanet, to wit, the six acres which he had of the chaplain of Ufford, be seized into the king's hands.

“The same Peter and Richard Gerewold are to be exacted. They were seen in the forest with bows and arrows within an enclosure. They had no chattels. And the sheriff is ordered that he exact them according to the assize in the county; and if they do not come, let them be outlawed.

“Robert of Ufford, clerk, and his whole township are in mercy [i.e. amerced] for the flight of the aforesaid Peter and Richard. . . .

“William the son of Simon of Barton is delivered into custody, because it was proved that falsely and through hatred he imputed to Stephen de Pin, clerk, that he had feasted upon two fawns, wherefor he will answer with his chattels at Barnack.” (Page 2.)

Here is an episode, also dated 1209, showing that as to one Henry the court had such doubts and charitable impulses as probably will be approved by the modern reader:—

“The whole township of Newton is in mercy for the flight of Richard Gelee, their reaper, who was accused of a buck shot in the short wood of Nassington, for which Henry the son of Benselin of Newton was taken.

“The foresters found in the wood of Nassington a doe with its throat cut, and hard by they found Henry the son of Benselin lying under a certain bush. And they took him and put him in prison. He comes before the justices and denies that he ever knew anything of that doe, except only that he went into that wood to seek his horse. The foresters took him and led him to that doe. The foresters and verderers, being asked if he were guilty thereof or not, say that they do not think that he was guilty, but they believe rather that Richard Gelee, the reaper of Newton is guilty thereof, because he

fled as soon as he heard that the aforesaid Henry was taken. And because Henry himself has taken the cross, and is not suspected, and has lain for a long time in prison, it is granted to him that he may make his pilgrimage; and let him start before Whitsunday; and if he return, and can find pledges of his fealty, let him remain in the forest.” (Page 3.)

Here is another episode, also dated 1209, illustrating the throwing of responsibility by one person upon another, in a way suggesting, as the extract itself says, an ancient vouching to warranty:—

“Thomas Inkel, forester of Cliffe, found in the wood of Siberton a certain place wet with blood, and he traced the blood in the snow as far as the house of Ralph Red of Siberton; and forthwith he sent for the verderers and good men. They searched his house, and in it they found the flesh of a certain doe; and they took Ralph himself and put him in prison at Northampton, where he died. But before his death, when he was in prison, he appealed Robert Sturdi of Siberton and Roger Tock of the same town, because they were evil doers to the forest together with him. And the foresters and verderers searched the house of the aforesaid Robert, and in it found the bones of deer; and they took him and sent him to prison. And in the house of Roger Tock they found ears and bones of wild beasts. And he was taken and imprisoned. Robert Sturdi comes before the justices and says that the dogs of Walter of Preston used to be kenneled at his house. Walter's hunters ate the venison whence came the bones; and Robert vouches the aforesaid Walter to warranty of this; and let him have him to-morrow. Walter [who doubtless had a royal warrant to hunt in the forest] comes and warrants him, saying that his dogs were kenneled in his house for fifteen days while he was hunting bucks.

“The aforesaid Roger Tock comes before the justices and denies everything. And the verderers and foresters witness that the ears and bones found in his house were those of beasts which the hunters of Walter of Preston took. And because Roger lay for a long time in prison, so that he is nearly dead, it is adjudged that he go quit; and let him dwell outside the forest.” (Pages 3-4.)

That last touch of mercy, because Roger



Tock had lain in jail so long awaiting trial, has a decidedly familiar appearance; and so has the tale told by one Richard in the following passage, also dated 1209:

"Richard the son of William de Baseville of Ketton was taken in the park of Cliffe, carrying one fresh skin of a buck, by Geoffrey the man of Roger Blund, to whom he confessed, as the same Geoffrey says, that he found that skin. And he was taken to Rockingham and imprisoned. And Richard comes before the justices and says that he bought that skin at Kimbolton from a certain unknown boy. And he is sent to prison at Rockingham for inquiries to be made at the pleas of Rutland on the Monday next before Mid-Lent at Ockham. Afterwards he made fine by twenty shillings that he might be quit of the inquiry whether he bought that skin at Kimbolton, Maurice Daundelay being pledge of his pence." (Page 4.)

And lest the apparent justice and mercy of most of these doings of the court may make us forget that the dwellers in and near the forests suffered hardships quite capable of exciting indignation, even in the narration of them at this late day, the entries of the same year, 1209, contain this passage:—

"The head of a hart recently dead was found in the wood of Henry Dawney at Maidford by the king's foresters. And the forester of the aforesaid Henry is dead. And because nothing can be ascertained of that hart, it is ordered that the whole of the aforesaid town of Maidford be seized into the king's hand with the wood belonging to the same town, on the ground that the aforesaid Henry can certify nothing of that hart." (Page 4.)

Here is a passage of the same date, giving a lively view of the rights of sanctuary:—

"Richard of Holton, Wilkin of Eastlegh, Hulle of Hinton, and Hulle Roebuck, the sergeants of the county, found venison in the house of Hugh le Scot. And Hugh fled to the church; and when the foresters and verderers came thither they demanded of Hugh whence that venison came. And he and a certain other person, Roger of Wellington by name, acknowledged that they had killed a hind from which that venison came. And he refused to leave the church but lingered there for a month; and afterwards escaped in the guise of a woman.

And he is a fugitive; and Roger of Wellington likewise. It is ordered that they be exacted, and unless they come, let them be outlawed." (Page 9.)

And now let us close our readings as to 1209 with an extract indicating the restrictions upon the use of one's own property in the forest:—

"William of the Ridge gives half a mark in order that his cowhouse which he erected upon his land at Sutton be not removed." (Page 10.)

Here is an incidental picture of the contents of a house, given in a forest inquisition dated 1251:—

"It happened on Thursday the vigil of Saints Fabian and Sebastian in the thirty-fifth year that when Geoffrey Hog, and John Ive, the walking foresters of the lord king of the park of Brigstock, were on their way in the same park, they found a trap set in Aldnatheshawe; and they heard a man cutting wood by night in the park, and on account of the thickness of the wood and the darkness of the night they could not come to him. And on account of the suspicion which they had against Robert le Noble of Sudborough, chaplain, they left the wood for Sudborough to watch in concealment to see if any one left the wood for the town; and so they met the said Robert the chaplain, who came from the wood and carried in his hand a branch of green oak and an axe. And the foresters demanded gage and pledge of him; and he could not find them pledges, and so they took him to the town of Brigstock to the house of Robert le N. . . .

"In the morning the foresters and verderers went to his house at Sudborough to make search; and so they found in his house two barbed arrows without fletches and the woodwork of a certain trap with the string of the trap broken into two parts; and upon the string was hair from deer.

"The chattels found there were appraised, to wit, a bushel of wheat, of the price of five pence, a bushel of beans, of the price of three pence; half a bushel of oats, of the price of two pence; a chest with dishes, cups and saucers, of the price of twelve pence, and a mare of the price of eight pence. A pelice was found there of the price of twelve pence; and wood was found in his court of the price of six pence. Total, four shillings.

"The foresaid chattels, which were taken with the hands of the lord king, were given to four men of the town of Sudborough, to wit, William the son of Osmund, Robert Page the reeve, Henry the son of William Dolfyn and Jocelin of Deene, to answer for their price before the justices in eyre of the forest.

"The broken string and the woodwork of the trap were given to the aforesaid four men to produce before the justices.

"The two broken arrows were given to Richard of Aldwinkle, the verderer, to produce before the justices.

"The snare of the trap which was found set in the wood together with all the string was given to Maurice de Solers of Brigstock to produce before the justices." (Pages 94—95.)

Here is a passage, dated 1255, giving a glimpse of the benefit of clergy:—

"It is presented by the foresters and verderers that a chaplain and seven clerks were found with bows and arrows in the king's road within the forest. They were taken by the foresters on suspicion. And Hugh of Goldringham, steward of the forest, retained them in prison; and afterwards he delivered them to Simon of Houghton, then sheriff of Huntingdon, who imprisoned them in the prison of Cambridge. And afterwards they were delivered before Master Simon of Walton and his fellows justices in eyre at Huntingdon to Robert then the bishop of Lincoln as clerks. And because the said Simon, then the sheriff, did not send word to the said justices that they were taken in the forest by the foresters for an evil deed and for trespass, therefore he is in mercy. And because Simon of Coppingford, the verderer, to whom the bows and arrows were delivered, that he might have them before the justices, now had them not, therefore he is in mercy." (Page 14.)

Here is another passage, dated 1255, giving another glimpse of the disadvantages pertaining to the ownership of real estate in or near the forest:—

"It was ordered by Robert Passelewe and his fellow justices last in eyre here for pleas of the forest that the houses of Vincent of Stanley which had been raised to the nuisance of the forest should be pulled down; and the doing of this was hindered by certain persons, Colin

of Merton, and Richard of Toseland, the bailiffs of Philip of Stanton the sheriff of Huntingdon. And the verderers witness that when they and the foresters came to pull down the said houses, as they were ordered, the said Colin and Richard of Toseland prohibited them from pulling them down. And when the foresters laid their hands on the said houses to unroof and pull them down, the said Colin and Richard forcibly drove them back saying that they would not in any way allow them to pull them down, because they had the precept to that effect of Philip of Stanton, who was then the sheriff of Huntingdon. And the verderers and foresters went to the same sheriff, and told him the nature of their precept concerning the houses to be pulled down, and how they were hindered by his bailiffs aforesaid by his precept. And the said sheriff said that they had no order thereof from him, and disavowed their deed entirely; whereby the order of the justices and what was for the king's advantage concerning the aforesaid houses to be pulled down remains undone. And therefore the sheriff is ordered that he cause the said Colin and Richard to come from day to day. Afterwards Richard came; and he could not deny that he impeded the said foresters and verderers as is aforesaid, and this without warrant; therefore he is in mercy." (Page 18.)

For the forest officials themselves, life in the forest was not wholly free from care; and by the following passage, also of 1255, one is convinced that Robin Hood and his companions are not mere sun myths:—

"On Wednesday the morrow of St. Philip and St. James when William of Northampton and Roger of Tingewick had come from the pleas of Stanion and were going towards Rothwell they were given to understand that poachers were in the lawn of Beanfield. And forthwith the said William and Roger and James of Thurlbear and Matthew his brother, the riding foresters, and the walking foresters came in all haste to that place so that they might take the said poachers. And when the foresters came into the forest, the said evildoers attacked them, and shot Matthew the brother of the said James of Thurlbear the forester so that the said Matthew died thereof. And then the said evil doers turned and fled. And on account of

the darkness of the night and the thickness of the wood the foresters could not follow them, so that they escaped. And an inquisition was made by four neighboring townships, Stoke, Carlton, Great Oakley and Corby, who said that the said evildoers were seen with bows and arrows and crossbows and greyhounds, and that they escaped, but that they could not ascertain who they were. And because the said townships did not come etc., therefore they are in mercy." (Page 28.)

There are many other passages worthy of quotation, especially the picturesque record on pages 99-102. Yet it is neither possible nor necessary to quote further; and by this time it must be clear to even the most matter-of-fact reader that this is an interesting book.

To the scholar it is hardly necessary to say that, like the other publications of the Selden Society, this volume is carefully edited. In addition to the original Latin text and a translation, the editor has given an introduction and a glossary for the benefit of those readers to whom the book is a basis for study rather than for light reading.

---

SELECTION OF CASES ILLUSTRATIVE OF ENGLISH CRIMINAL LAW. By *Courtney Stanhope Kenny, LL.D.* New York and London: The Macmillan Company. Cloth: \$3.00 (pp. xix + 544).

This selection of cases by the Reader in English Criminal Law in the University of Cambridge, England, is interesting as showing the extension of the case system of study in the English Universities. The book is prepared on much the same principle as our American books of cases for use in law schools. There are no head notes, but the editor states the point of each case in a few words at the head of it. Several American cases are included. The scope of the book is slightly different from that of most of our American collections. The general doctrines of the law are rather slightly treated, but considerable space is given to the study of the more important particular crimes, such as homicide, larceny and similar crimes, forgery, perjury, conspiracy, bigamy, libel and treason; and quite adequate treatment is given to the subjects of presumptions, burden of proof, and evidence in criminal trials. The selection of

authorities appears to be carefully done and the book might well prove of use in an American law school which devoted a comparatively small amount of time to the study of criminal law and procedure. For the lawyer the collection should be of considerable value; especially as it contains many valuable English cases not found in any reports accessible in most of our law libraries, such for instance as the Sessions papers of the Central Criminal Court, and the new series of State Trials.

---

COMMERCIAL TRUSTS. The Growth and Rights of Aggregated Capital. By *John R. Dos Passos*. New York: G. B. Putnam's Sons. 1901. Cloth. (pp. vi + 137.)

A STUDY OF THE UNITED STATES STEEL CORPORATION IN ITS INDUSTRIAL AND LEGAL ASPECTS. By *Horace L. Wilgus*. Chicago: Callaghan and Company. Buckram. 1901. (pp. xiii + 222.)

THE CONTROL OF TRUSTS. An Argument in Favor of Curbing the Power of Monopoly by a Natural Method. By *John Bates Clark*. New York: The Macmillan Company. Cloth. 1901. (pp. x + 88.)

As Mr. Dos Passos recites: While you are discussing the fashion of things, the fashion is gone by. The trust agreement, its schemation, its operation, its faults, is now no longer worth discussion; for it is a dead thing. It is with its successor we are engaged now, the incorporated consolidation—that enormous aggregation of capital, stupendous as judged by any standard the industrial world has known. In times of change there is division of councils; some maintain that the original taint of illegality remains; others maintain that it is purged. Mr. Dos Passos showed, in this argument of his two years ago, that what we have in the modern form of the consolidation is the corporation—that and nothing more. So long as we allow five men to combine to form a corporation, we must allow fifty thousand men to form a corporation; if a corporation may have a capital of one thousand, it may have a capital of one billion. It is a corporation in one case or the other, a higher type by the process of evolution doubtless, but the same thing, nevertheless. Mr. Dos Passos speaks squarely here; and the march of events in the

last two years makes him more in the right than when he spoke.

The change has come from smaller units in production to larger units in production, from distribution upon a lesser scale to distribution upon a greater scale. And yet so slow is the appreciation of the accomplished fact, that the result is as yet beyond our imagination. And indeed, when Professor Wilgus describes to us the United States Steel Corporation, there are times when the enterprise is almost unthinkable; for the ordinary standards fail us. We may nod at schedules, at enumerations of pay rolls, at lists of products, at inventories of plants, at accounts of disbursement and of income,—but do we comprehend? Very probably we do not; for these things are unwonted. Just as we had settled our industrial system upon a basis of competition, we found in the next decade that the industrial system had undergone this change; we had to deal with concentration. This book of Professor Wilgus is of great value; for we need to know what the new conditions are first of all.

For these are new conditions. The business carried on by these great manufacturers differs more than in degree from the business of small manufacturers; it differs in kind. Regulation of competition is enough for the small business,—little law is needed; but in the large business the regulation of competition is not enough,—much law is needed; otherwise, we shall find ourselves in times of coercion, oppression, depredation—industrial bondage. But note that our law has been used to deal with businesses that have practical monopoly, and to curb them. The law is used to deal with the ferry and the bridge, with the railroad and the tram, with water and light, with the telephone and the telegraph, with the grain elevator and the stockyard, and like businesses. Such public callings must by our law sell to all that apply, sell at a reasonable rate to all that apply, and sell to all without discrimination. Now the businesses of selling petroleum, of selling steel and the others, can no longer claim the liberties of private calling, for they have attained enough of monopoly to become affected with the public interest. That, expressed from a lawyer's standpoint, is in substance what Professor Clarke contends for, with a foresight rare in current discussion.

HISTORY OF THE BENCH AND BAR OF CALIFORNIA. Edited by *Oscar T. Shuck*. Los Angeles, Cal.: The Commercial Printing House. 1901. With portraits. Cloth. (xxiv + 1152 pp.)

A HISTORY of any State bench and bar is apt to be dull reading to the lawyer outside of that particular jurisdiction; but if that is the general rule, exception must be made in favor of the recently published *History of the Bench and Bar of California*. Without detracting from the cleverness of the contributors and the ability of the editor, it is fair to say that the elements which make the legal history of California interesting to the outside reader, are the romance and adventure which form so essential a part of all the early life of that State. What other State can furnish such exciting tales as some of those in the present volume—the history of lynch law, particularly that form of it practised by the Committee of Vigilance of San Francisco; an account of celebrated meetings on the field of honor,—for the duel seems to have been an important factor in the early annals of California law and politics; and the tragic tale of the Sharon cases?

But if articles such as these will find readers both in and out of the profession, there are other articles, of a more serious character, which are of professional interest in that they show the growth and development of California law. Some of these treat of special branches of the law, such as the law of Irrigation and of Mining, subjects which are of especial interest to the student of law, because they show well the strength and the weakness of our system of law in adapting itself to new facts; while others, of a historic nature, starting from the old Spanish and Mexican systems of jurisprudence, trace the progress of California law down through the military-civil government, the birth of the Commonwealth and the adoption of the Common Law to the present Code.

Roughly speaking, one third of this large volume is devoted to special articles on the above-mentioned and kindred subjects; the rest of the volume is given over to reminiscences and biographical sketches, of past and present members of the California Bench and Bar, where, sandwiched in between the more or less prosy dates and facts, are many good stories.

A BRIEF OF THE MODES OF PROVING THE FACTS MOST FREQUENTLY IN ISSUE OR COLLATERALLY IN QUESTION ON THE TRIAL OF CIVIL OR CRIMINAL CASES. By *Austin Abbott*. Second Edition. By *Publisher's Editorial Staff*. Rochester, N. Y.: The Lawyer's Co-operative Publishing Company. 1901. Law sheep. (xxii + 653 pp.)

So practical and helpful a book as Abbott's Trial Brief merits a second edition. It is of no little importance to the trial lawyer to have at hand a volume, where at a glance can be found the answers to many difficult practical questions constantly arising in the matter of the admissibility of evidence and of the modes of proof. This present edition follows the alphabetical arrangement used in the first edition, by far the most convenient arrangement in a work of this character, but adds new chapters, as, for example, those on Insanity, Paternity and Survivorship.

NOTES ON THE UNITED STATES REPORTS. Book xii. by *Walter Malins Rose*. San Francisco, Bancroft-Whitney Company. 1901. Law Sheep. (pp. 1083.)

NOTES ON THE UNITED STATES REPORTS. Book xiii. Index to the twelve Volumes of Notes on the United States Reports, embracing all propositions of law laid down in Supreme Court Decisions, 2 Dallas to 172 United States. by *Walter Malins Rose* and *W. A. Sutherland*. San Francisco; Bancroft-Whitney Company. 1901. Law Sheep. (pp. 1050.)

With the twelfth volume of these *Notes*, Mr. Rose has brought this series almost down to date, this present volume covering 141-172 United States; so that one may now have at one's elbow, for ready reference, a set of volumes in which can be found at a glance all of the citations, both by Federal courts and by courts of last resort of all of the States, of any United States Supreme Court decision, except those in the few latest volumes. The value and convenience of such a work, if well done, is apparent. In the present instance the scheme of the notes is well conceived, and the work has been carefully and thoroughly done.

The thirteenth volume is an index to the preceding volumes; and it is more than that, being, in fact, a brief digest as well as an index. It adds materially to the value of the series.

ATLAS AND EPITOME OF DISEASES CAUSED BY ACCIDENTS. By *Dr. Ed. Golebiewski*, of Berlin. Translated and edited with additions by *Pearce Bailey, M.D.* Illustrated; including forty colored plates. Philadelphia: W. B. Saunders & Company. 1900. Cloth. (549 pp.)

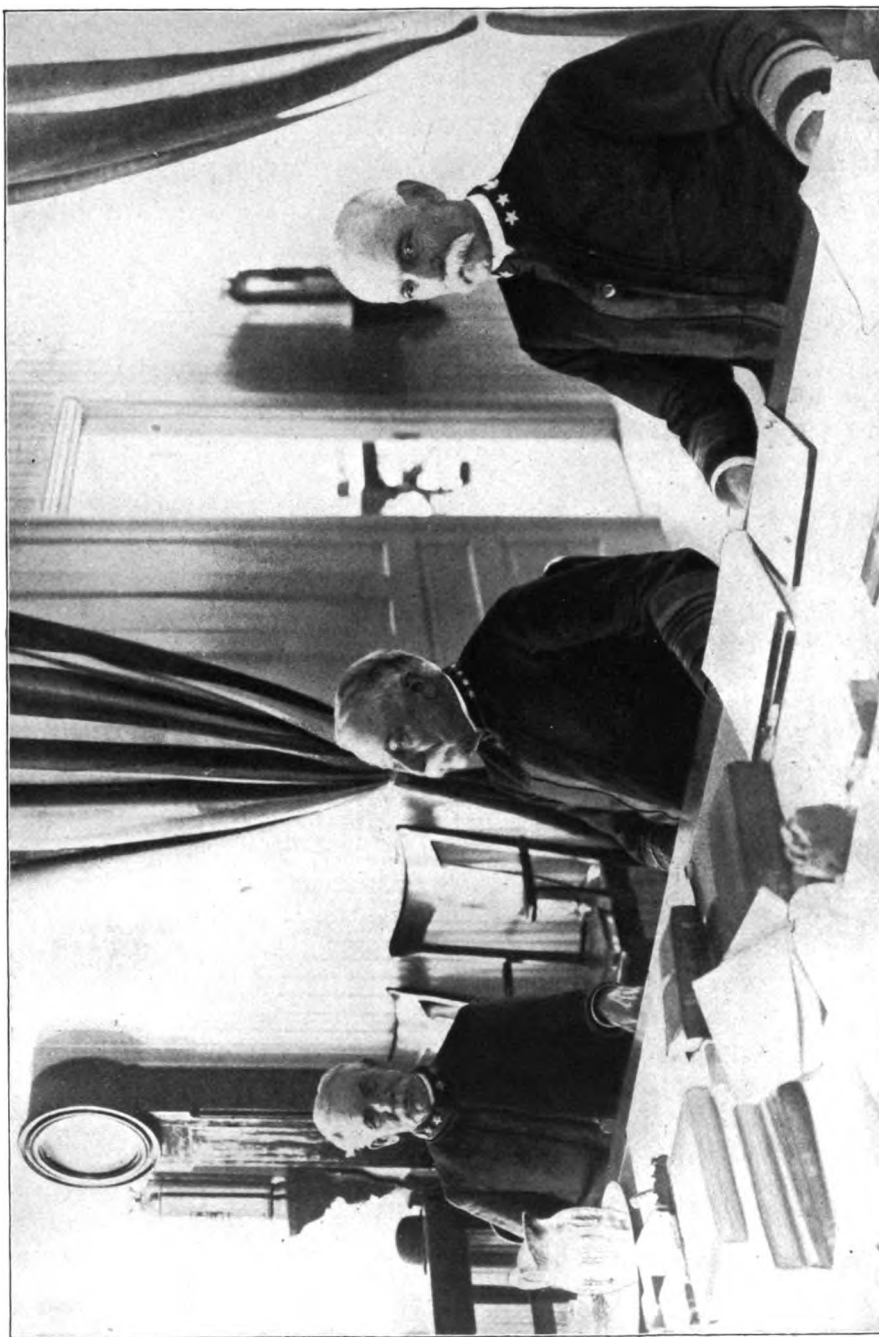
This volume may be classed as a law-book, for the reason that its especial value comes from its consideration of the seriousness or permanency of injuries resulting from accidents in relation to the question of the amount of indemnity which should be awarded in accident cases. In considering a particular disease or injury, the usual medical description is followed by a list of cases showing the extent and duration of the injury, and, where this is possible, the insurance allowance actually made in the given cases. To counsel having to deal with accident cases on behalf either of railroads and other large employers of labor, or of accident insurance companies, this treatise will be of value; and equally valuable will it be to counsel for the plaintiff.

THE AMERICAN STATE REPORTS. Vol. 81. Containing cases of general value and authority, decided in the Courts of last resort of the several States. Selected, reported, and annotated by *A. C. Freeman*. San Francisco. Bancroft-Whitney Company. 1901. Law sheep. (1006 pp.)

One of the most interesting notes in this present volume is that on "Liabilities of Water Companies," which follows the case of *Middlesex Water Company v. Knappmann Whiting Company*, 64 N. J. L. 240. In the principal case the Water Company was held liable to the defendant company for loss resulting from the destruction by fire of the defendant's factory by reason of the failure of the water company to fulfill its express contract to supply water to the factory for fire purposes, notwithstanding such failure was due to no fault on the part of the water company. The decision rests on the express contract to supply water for fire purposes; in the absence of such express contract the great weight of authority is against such liability.

Among other excellent notes are those on Bet-terments, on Collateral Attacks on the right of an acting administrator, and on Appurtenances.





Copyright, 1908, by WILLIAM MASTERS.

REAR-ADMIRAL BENHAM.

ADMIRAL DEWEY.

REAR-ADMIRAL RAMSAY.

THE SCHLEY COURT OF INQUIRY.

# The Green Bag.

VOL. XIV. No. 3.

BOSTON.

MARCH, 1902.

## A LEGAL VIEW OF THE INQUIRY GRANTED TO REAR-ADMIRAL SCHLEY AND OF OTHER INQUIRIES BY MILITARY COURTS.

By CHARLES E. GRINNELL.

	PAGE		PAGE
CONFLICTING PRINCIPLES, . . . . .	100	HEARSAY EVIDENCE, . . . . .	131
COURTS OF INQUIRY, . . . . .	102	CROSS EXAMINATION, . . . . .	132
DEWEY'S DISSENT, . . . . .	108	COURT'S ATTENTION, . . . . .	133
SAMPSON'S EQUITY, . . . . .	114	COURT'S CONTROL, . . . . .	133
RIGHT TO EXCLUDE, . . . . .	118	INSTRUCTING THE COURT, . . . . .	134
OPEN SESSIONS, . . . . .	120	POINTS OF PRACTICE, . . . . .	134
APPEAL TO THE PRESIDENT, . . . . .	122	NAVAL PECULIARITIES, . . . . .	136
EXCLUSION OF COMMAND, . . . . .	123	DISQUALIFYING HOWISON, . . . . .	136
TASK OF JUDGE ADVOCATE, . . . . .	125	RULINGS AND ARGUMENTS, . . . . .	141
BIAS IN EXAMINATIONS, . . . . .	126	CHARACTERISTIC POWERS, . . . . .	142
INGENUITY IN ADVOCACY, . . . . .	128	VALUE OF THE CASE, . . . . .	144
EVIDENCE OF OPINION, . . . . .	129	LEGAL RESULTS, . . . . .	145

AT the request of the editor of THE GREEN BAG the present writer has examined the printed edition of the record<sup>1</sup> of the recent Court of Inquiry before which Rear-Admiral Schley appeared as applicant for an investigation of his conduct as Commodore in the Santiago campaign, in order to give, as nearly without bias as one can after a court's report, a view, not of the evidence or of the proof, but of the proceedings of that court as a military instrument in the light of old and new precedents and of authoritative treatises upon military law in England and the United States. Principles

<sup>1</sup> Record of the Proceedings of a Court of Inquiry convened at the Navy Yard, Washington, by virtue of a precept signed by the Hon. John D. Long, Secretary of the Navy, in accordance with the request of Rear-Admiral W. S. Schley, for the purpose of investigating his conduct during the war with Spain. See note at end for specifications, opinions, recommendations, and decisions before and after appeal.

underlying the decisions of the Secretary of the Navy and of the President of the United States concerning those proceedings have also been studied in order to understand the legal side of our military system.

The sagacious warning has not been forgotten which was given by Willes, J., in an old case, that "Military matters between military men are for military tribunals to determine."<sup>2</sup>

Yet there is a liberal side to every profession, and since the navy is so cosmopolitan, and members of the bar are trained to endure contradiction, it seems not impossible that professional points in a case in which both professions were engaged may be discussed with mutual interest.

It is intended to consider this case with-

<sup>2</sup> Dawkins v. Lord Rokeby, 4; Foster and Finlason, 806 (837).



out reference to any popular or professional discussion about the glory won or deserved by any person. A legal view of glory might not be interesting. For present purposes it is sufficient to cite the scriptural text, "One star differeth from another star in glory." Glory may or may not be supported by reason. It springs from uncontrollable emotions when given by a people. When it is denied by professional critics no volunteers are needed to play the parts of the Furies. This case has so many interesting features that it may be seen more clearly when a selection is made.

#### CONFLICTING PRINCIPLES NECESSITATE POLITICAL POLICY.

Legal principles, military customs, and political policy are necessary to explain its beginning, the court's method of examination, its findings of facts and of opinion, and its recommendation. Those same lights also are required to test the substance and form of the dissent by the eminent president of that distinguished court.

No statesman can forget, and no citizen, whatever his party may be, should ignore the fundamental political necessity that any administration worthy of the name must have a policy not merely for its own standing, but also, and chiefly, because it should stand as it deems best for the good of the nation. The President of the United States as Commander-in-Chief of all its forces, is rightly guided, not merely by military law, and by legal considerations in such command, but also and principally by his comprehensive knowledge of the whole existing state of the nation and all its interests. Of this vast system he alone is the centre, and he alone may be fully and correctly informed. At all events the awful responsibilities of its executive management rest upon him. The mem-

bers of his cabinet, as heads of their departments, share to a formidable degree the burden of his appointments, his dismissals, his toleration, his control.

In time of war, no fire of any enemy is hotter, on any field or any sea, than the partisan lightning aimed at the President. When a national force suffers a defeat, even so-called friends of the administration join in an explosion of national abuse.

Then the unwritten lawlessness of human nature demands a scapegoat. The administration, if it would not be punished itself, must punish justly or unjustly. This germ of anarchy is a disease of every government. Our own country, England, present and past, the continental nations, the East, and the peoples of remote antiquity, furnish no exception to the terrible rule.

But after a national victory even the larger part of a nation endures tolerance with complacency, and even if public servants may have been faulty their chief sometimes finds it for the public welfare to let bygones be bygones. Provided that a country is substantially well governed, it adds to the healthy life of its people not to check their natural enthusiasm. Their feelings being unmeasured, they are happier when their occasional praise of their public servants bears some proportion to their more constant blame.

If the findings of the recent Court of Inquiry are correct, and the late President McKinley knew and thought substantially what these three experienced judges have reported as facts, it is not improbable that he, with the unusual adaptability which characterized his mind and affected his policy, may have preferred not to inquire what might have been the results, or what were the military faults of any officer's acts or omissions before the victory in which such officer risked his life and won the applause

of millions of his countrymen. This view is according to the suggestion of the present President of the United States in his memorandum on the appeal.

But the last forty years have reminded us that even accommodating heroes cannot live upon victory alone; they desire promotion and other rewards more substantial than those of record and office. Thus by natural choice or the encouraging pressure of ardent friends, they permit their reputation as heroes to be used in competition for some other kind of success. Then they have to reckon not only with the multitude, but also with professional critics. As has happened after many wars in many places, the soldier or the sailor who is warmly greeted by the multitude may find the cold shoulder of his profession turned towards him.

Every profession has a long memory, and though it can remain long silent, it is unutterably dangerous. If its feelings high or low are sooner or later aroused, they are sure to make themselves felt with precision and rapidity. Even men of high professional character join, for the good of their profession, with men who consciously or unconsciously cherish a jealousy which feeds the small malice charged by Lord Bacon to small politicians.

When the heroes in their lifetime enter that temple of ambition which is called history by those who write it, and by those whose statues are on its altars, they learn too late the fate of some of those whose remains are in its crypts.

A historian of the past may disavow, as Hume disavowed, any spirit of faction, but he may lack the art of veiling the feelings of the present. The first of Mr. Blaine's two large volumes, entitled, "Twenty Years of Congress," was a brilliant party pamphlet; the second was a debit and credit account with his political friends and enemies.

Many a warrior would rather be shot at by guns than attacked by a "history," and it may be said to require almost a taste for martyrdom to volunteer an attack upon a historian. Yet the bitter must be taken with the sweet. Even fame has its shadow. Glory may be but the silver lining of a storm cloud. After Santiago and victory come historians with ambitious stories, and the puzzled hero, instead of meeting a writer by writing, is driven by the supposed demand of his own honor, or the agitation of his sensitive friends, to invite the risk of a formal examination.

Thus prudence may be worn out, and imagination dictates that the only course left for self-respect or for friendship is to ask a patient administration which had closed the gates of a war, to open those of a court of inquiry.

It is a new prop to the growing vanity of authors, when a veteran officer, with a commission of rear-admiral granted because of his part in a memorable victory, finds it apparently expedient for his reputation or ambition to complain to the Navy Department of a book. One is tempted to ask, cannot one book safely be left to be balanced by other books.<sup>1</sup> No one, however, can be surprised that Rear-Admiral Schley did not wish to have midshipmen taught by a text-book that he had been a timid commodore. It would

<sup>1</sup> Readers who like to read more than one side in the discussion of the facts which is not entered into here are referred to Mahan's "Lessons of the War with Spain" criticising Schley's campaign, and to an article on the Schley Court of Inquiry in the *National Review* of London, for January, 1902, by H. W. Wilson, author of a part of "The Royal Navy," of which book Colonel Theodore Roosevelt is author of another part. Mr. Wilson is also author of "Ironclads in Action." In his article, published since the court's report, he criticises Schley, but gives him credit for personal courage, and says with regard to the "loop" — "the turn is perfectly defensible," and states his reasons: he also gives Sampson credit for his plans.

Now that the record is being studied and the merely personal controversy wanes, the permanent military problems may be expected to be discussed from time to time as other historical matters are.

seem to have required more courage in him than judgment in his friends, to invite the danger of being made an object-lesson on other points by some of his own subordinates.

He had taken his part in a victory, and a large part of the people had made up their minds at the moment, as they usually do, and had greeted the names and the persons of every one concerned in the fight with patriotic enthusiasm and personal admiration. No technical question of command troubled the admirers of any officer. Nor was the popular fund of glory less for any other, because poured out so generously for this one. Each officer was praised for what was thought praiseworthy in what he did. There has never been any want of popular glory for any man in or near that fight. Whether a sailor's cap bears the word "New York," "Brooklyn," "Oregon," or "Resolute," it brings him honor.

The burning questions have been those of official and professional rewards. These have to be fought out in naval and political discussions, which it is not the purpose here to enter. These preliminary remarks are intended to approximate a proper perspective within which to look at the court of inquiry as a formal incident among many unregulated results of the tumult of war.

Strictly speaking, the court of inquiry was asked for, was granted, was conducted, was concluded and approved, with reference solely to the conduct of Commodore Schley. It is true that his counsel, in the preliminary examination as to whether Rear-Admiral Howison was qualified to serve as a member of the court, referred to that officer's opinions concerning the position of Admiral Sampson in the fight; but neither in the course of the inquiry did the Court admit, nor in the final arguments did any counsel attempt, the suggestion that Admiral Sampson was a party to the investigation.

Military law leaves so much to the discretion, even, of its courts, and those courts, being appointed for special occasions, differ so much in personal and other circumstances, that in order to understand the opinion of a military court it is necessary to remember that the first principle in military law is obedience to superiors and not individual liberty. The Judge Advocate stands in confidential relations to the court as adviser, but the members of the court are not bound to follow his advice. Whatever the precept orders the court to do, it must do, whether the rules or principles governing civil courts of common law and of equity have to be regarded or disregarded in doing it.

#### COURTS OF INQUIRY AS AIDS TO A GOVERNMENT.

War is said to silence laws, but lawyers and warriors work tolerably well together, when the warriors listen to argument and the lawyers recognize military rules. The lawyers' ability to marshal facts, to distinguish points, and to bring out of witnesses what they know upon the points at issue, without all their beliefs and impressions and prejudices, aid the military desire for clearness and despatch; the military habit of decision and command hastens the judgment which the legal spirit prays for yet dreads. The Code Napoleon is a striking instance of such successful collaboration.<sup>1</sup> The great soldier who lent his name to that enduring system read the books which his lawyers advised, sat with them at their work, joined in their discussions, submitted to instruction; but, being thus informed, kept control, and when undue argument threatened despatch, he stopped them, decided the point at issue, and ordered the next business to be taken up.

<sup>1</sup> "The Consulate and Empire of Napoleon," by Thiers.

Courts of inquiry are as well adapted to their purpose in principle and practice, especially now in the United States, as any human institution adapted to practical ends. But one reason why they stand so high is that they are advisory rather than executive.

and the Commanders-in-Chief of our army and navy, have of course long recognized the need of the information which courts of inquiry are intended to furnish.

The art of government is of longer life than any form of government. Its familiar



JUDGE-ADVOCATE GENERAL LEMLEY.

Advice, clear and steady as it may be, may be qualified and may temper its truth with both justice and mercy, even when nothing but punishment in some form, direct or indirect, can be the course of the executive officer to whom such advice is given at his own request and order. The Commanders-in-Chief of the army and navy of the British Empire,

knowledge and practical experience of the hourly passions and habits of all classes of men are deeper than any written law. A scholar may know the law, but a ruler must know men. He who would direct the storm must ride the whirlwind. The soldier's range of power is happily narrower than that of the statesman, but within the military field a

competent officer of the army or of the navy must be able to make his commands obeyed. This is even more fully the case in the United States than in older countries; because here an official superior must sooner or later prove his personal worth, if he would control his subordinates as he should.

It is startling, not only to one who is fond of ease and to one who is used to shrugging his shoulders at counsels of perfection, but even to one who is accustomed to legal standards of reasonable performance, to learn that in the army and the navy one must "do his utmost" against the enemy, and whatever he omits of that is at his peril. In military law, as at common law, these standards are external.<sup>1</sup> Yet such a standard cannot be enforced with the permanent success that reason demands unless the persons in chief authority are thoroughly informed even to the extent of minute details. Critical events happen when many a man of ordinarily good sense is so absorbed by action in one direction, or

<sup>1</sup> Compare the Judge Advocate's argument, page 1819 of the Record, where he says, "This was not an error of judgment; it was an error of conduct," with Mahan's "Types of Naval Officers," Hawke, p. 94, and with Holmes's "Common Law," pp. 107-128. Captain Mahan's recent writings concerning distinctions between "errors of judgment" and "errors of conduct" have been criticised by Mr. Park Benjamin in an article entitled "A Casuistry in Legal Ethics" in *The Independent* for December 26, 1901. Captain Mahan's views perhaps are not intended to be expressed with the fullness and precision of legal terms, but his words seem to be in accordance with the legal doctrine that when a recognized standard of conduct is established, then judgment is either irrelevant or, at least, is not to control the question of the liability of the person responsible for the conduct. The difficulties of recognizing and establishing a standard of conduct and the difficulties of applying it are pointed out in Holmes's "Common Law" above referred to. To say that in ordinary life the standard of negligence, for instance, is external, means that one who is accused of negligence must be judged by what is to be taken as the conduct of the average prudent man. This is not what the accuser or the accused thinks or does, nor is it what the judge or jury as such may think or do. It is what the average prudent man is to be supposed to do. As experience teaches juries and judges what the average prudent man is—for he exists only as a doctrine—the law is enriched by such teaching being taken as their guide in determining what is negligent in a defendant or plaintiff and what is not. When the plaintiff or defendant in his own judgment has practised due care

anxiety in another, that his head is lost to all but his own immediate task or burden. Hence it is difficult to learn all the controlling facts of most important movements, even from responsible experts who were on the very spot. Wherefore the head of an administrative department needs a ready means of trustworthy search, not by spies as against an enemy of the country, but such as brothers in arms can afford concerning one whose training is their life, whose honor is their glory, and whose shame would be their sorrow. Such inquirers are worthy of confidence when they are wisely chosen, and are subject to be fearlessly challenged by those whose conduct may be in question.

In the armies and navies of the United States and of England, the court of inquiry has been long held in honor, and has served those human needs of knowing all and of learning whether all should be pardoned or not. In this country the system for such a court is now more highly developed in detail than it used to be; but the principle re-

he is often surprised to find that he has been negligent according to that doctrine which is external to him as well as to the other party and to the judge and jury. The surprise is frequently shared by all of them because of some peculiar circumstances which have not before been considered by them under the test of what the imaginary legal average prudent man would do if he were in the place of one or the other party.

To apply this to military law would be to say that the conduct of an officer in a campaign is to be tested not by his own judgment of his duty but by what the average brave and competent officer of his rank, station and command is to be assumed to do as "his utmost." Captain Mahan's histories show that this standard changes with the character of nations. If his own appreciation of past standards has developed in view of such practical responsibilities as those of the recent war with Spain, his latest opinions become thereby even more interesting whatever differences there may be among his many readers. One of the difficulties of a public discussion is that while some professional critics are applying an external standard to an officer's conduct, other critics are applying many internal standards to the officer's judgment. Mr. Benjamin suggests that if the standard is external "the law of 'his utmost' is in fact the law of *the* utmost." See the article entitled "The Naval Law of his Utmost" by Park Benjamin in "The Independent" for January 16, 1902; also compare Mahan's "Types of Naval Officers" with his "Influence of Sea Power upon the French Revolution and Empire" on Admirals Mann and Byng, and his "Influence of Sea Power upon History" on Admirals Byng and Matthews.

mains, that a court of inquiry is not strictly a court as a court-martial is a court, or as a civil court is a court. There is no mere formal issue before it, no one is arraigned there, there is no plea, there is no verdict of guilty or of not guilty, there is no sentence to punishment. "Its proceedings are not a trial, nor is its opinion a judgment."<sup>1</sup> Its members are sworn simply to examine and report as ordered.

Yet a commander has sometimes acted upon its report as a final ground of punishment. It was a court of inquiry that examined Major André, and reported the facts, with its opinion that he ought to be considered as a spy. At the end of its proceedings "he was remanded into custody."<sup>2</sup> He was hanged a few days afterwards. This was an exception.

This court remains a board of a higher sort, rather than a court; consequently its scope may be more comprehensive and its proceedings freer than those of a court for trials, whether in civil or military law. Being of a less technical character, it is more open to considerations of fairness and honor than courts which are legally bound by rules that may exclude evidence upon that aspect of a matter.

Its findings have been said not to be evidence before a court-martial, and to be powerless to influence a court-martial legally or officially.<sup>3</sup> There is now a provision concerning admitting its "proceedings."

The Supreme Court of the United States has said that a report of a military court of inquiry could not be pleaded in bar to an indictment for murder before a civil court,<sup>4</sup> but that weight should be given to its finding as the expression of the opinion of the military court. Its proceedings are not

imperilled by such errors as might affect the legal validity of the record of a court-martial.<sup>5</sup> Even if it does not fully comply with the order appointing it, the very imperfections of its report may serve to enable the appointing power to amend and improve its own order by a more specific precept, and thus to acquire more valuable or fuller information than might otherwise have been obtained.

Not only can one party to a difficulty apply for a court of inquiry, but two officers have been known to invoke such aid towards arbitration between them.<sup>6</sup>

But with all its elasticity, it must stick to the matter and to the purpose which it is not only appointed but ordered to report upon.<sup>7</sup> For a departure, it might be censured by the authority it is created to serve. Nevertheless, its honest opinion is its own, and its expression of such opinion is free, provided its language and manner are temperate and proper.<sup>8</sup> Although a military man is not at liberty to use the same freedom of speech which other citizens enjoy, and must obey orders as to his language and conduct, the very order creating a court of inquiry, when it commands it to report not only facts but also its opinion, requires its members to speak their minds.

Even if such opinion should displease the convening authority, and the court should be ordered to reconsider and requested to modify its opinion, it is doubtful whether in this country any discipline more severe than censure, or some form of criticism, could be lawfully visited upon a court which in good faith should stand to the only opinion it could honorably profess. According to the whole theory of the system, such firmness might be of far greater service to the government than the most ingenious pretensions.

<sup>1</sup> Winthrop's "Military Law," ch. 24.

<sup>2</sup> Winthrop, ch. 24.

<sup>3</sup> Winthrop, ch. 24.

<sup>4</sup> U. S. v. Clark, 31 Federal Reports, 710 (715).

<sup>5</sup> Winthrop, ch. 24.

<sup>6</sup> Winthrop, ch. 24.

<sup>7</sup> Winthrop, ch. 24.

<sup>8</sup> Winthrop, ch. 24.

This freedom of opinion, when the court is ordered to report an opinion, extends to the right of individual members of the court to dissent from the opinion of the majority of the court. And since the object of the existence of the court is to inform the superior authority of the situation to be inquired into, to the best of its ability, there may be a majority and a minority report of facts, also, as well as of opinions. A difference of opinion as to the existence or meaning of certain facts might render it necessary for some members of the court to report other facts in addition to those concerning the existence of which all might agree. To withhold dissent from a finding of fact or the expression of an opinion, when even one member of the court could not but entertain such dissent, would not be according to the order to report; and to forbear from adding what he should regard as an essential finding of fact, or as an opinion necessarily required by facts and needed by the government, provided it be within the government's precept, would be to shirk the very duty the precept requires him to fulfil. Accordingly authorities upon military law so hold.<sup>1</sup>

Of course to report extraneous facts or to express irrelevant opinions would be a transgression, and might subject the court or individual member to censure. But, nevertheless, either the court or its individual members are at liberty, in the course of reports, to add to what is strictly necessary of fact or opinion further remarks upon matters which, in the judgment of the court or of a dissenting member, are legitimately within the subject and purpose of the inquiry. To draw the line legitimately in professional investigations requires professional knowledge and judgment.

<sup>1</sup> Hough's "Precedents in Military Law," ch. 17; Winthrop's "Military Law," ch. 24.

Neither the court nor its individual members are free to avoid dissent by ignoring the precept and substituting a unanimous evasion for an obedient although divided report. No matter how strongly class spirit, whether of rank or of the general service, may cause every member of a court of inquiry to try to avoid strict compliance with the order creating it, it is the creature of such order, and no professional knowledge or united judgment can relieve it from obedience.

A striking instance is found in the early days of the Duke of Wellington, when, as Sir Arthur Wellesley, he was in command of the English army in Portugal in 1808. He had made his plans and was engaging in the battle of Vimiera, against the French army, when he was suddenly outranked by the arrival of Sir Harry Burrard. Sir Harry Burrard, out of consideration for Sir Arthur Wellesley, as well as for the desired victory of the English army, refrained from interfering with the control of the battle, and permitted Sir Arthur Wellesley to command throughout the battle and to win the victory of Vimiera. Afterwards, Sir Hew Dalrymple arrived and outranked them both, and although the energy of the future Duke of Wellington would probably have pushed him on to press the advantage of his superiority and his success against the defeated Junot, an armistice was agreed on, which was approved by five generals of the English army, an illustration, perhaps, of the saying of Napoleon that a council of war never fights. The depletion of energy indicated by the armistice was followed naturally by the celebrated convention of Cintra, a treaty denounced in England, because it permitted the French to retire with many of the honors of war. The English nation was said to be aggrieved by such armistice and convention, and seven generals were ordered to serve as a court of inquiry, as the order read, to inquire "into

the conditions of the said armistice and convention, and into all the causes and circumstances (whether arising from the previous operation of the British army or otherwise) which led to them, and into the conduct, behavior, and proceedings of the said Lieutenant-General Sir Hew Dalrymple, and of any other officer or officers who may have held the command of our troops in Portugal, and of any other person or persons as far as the same were connected with the said armistice and convention, in order that the said general officers may report to us touching the matters aforesaid for our better information." The order directed them "to report a state thereof, as it shall appear to them, together with their opinion thereupon, and also with their opinion whether any, or what further proceedings should be had thereupon."<sup>1</sup>

They met, examined into the entire matter, including necessarily the succession of commands, involving also the temporary voluntary suspension by Sir Harry Burrard of his own command, already related, and differed in their opinion as to the propriety of the armistice and convention. Therefore, although the order creating the court directed them to report, not only the facts, but their opinion concerning the armistice and the convention, they simply agreed to differ on that point, and tried to avoid their disagreeable task by reporting a statement of facts and by adding to it the following limited opinion and recommendation, signed by every member of the court:

"On a consideration of all circumstances, as set forth in this Report, we most humbly submit our opinion, that no further military proceeding is necessary on the subject. Because, howsoever, some of us may differ in our sentiments respecting the fitness of the convention in the relative situation of the two armies, it is our unanimous declaration, that unquestionable zeal and firmness appear

<sup>1</sup>"The Proceedings on the Enquiry into the Armistice and Convention of Cintra and into the Conduct of the Officers concerned." By John Joseph Stockdale. London, 1809.

throughout to have been exhibited by Lieutenant Generals, Sir Hew Dalrymple, Sir Harry Burrard, and Sir Arthur Wellesley, as well as that the ardour and gallantry of the rest of the officers and soldiers, on every occasion during this expedition, have done honour to the troops, and reflected lustre on Your Majesty's arms. All which is most dutifully submitted.

(Signed)

DAVIS DUNDAS, *General*.  
MOIRA, *General*.  
PETER CRAIG, *General*.  
HEATHFIELD, *General*.  
PEMBROKE, *Lieut.-General*.  
G. NUGENT, *Lieut.-General*.  
OL. NICOLLS, *Lieut.-General*.

Dec. 22, 1808."

But even so formidable a body as a court of seven generals must obey the orders of its superior officer, and this court had not obeyed either the spirit or the letter of the precept; therefore, the commander-in-chief, with a politeness of language which deprived it of none of its force, issued to the court the following order, addressed to its president:

"Your opinion upon the conditions of the armistice and convention, which the words of His Majesty's warrant expressly enjoin, should be strictly examined, enquired into, and reported upon, has been altogether omitted," also "it appears upon the face of your report that a difference of opinion exists among the members of the board, which may probably produce a dissent from the majority upon these very questions. You will be pleased, therefore, to desire such of the members as may be of a different opinion from the majority upon these two questions, to record upon the face of the proceedings their reasons for such dissent."

This order was an express command to those members of the court who were dissenters to dissent expressly; and it is an important precedent in view of some of the misunderstanding which has recently appeared in our country concerning the duties of members of a court of inquiry. Accordingly, the court reassembled, four of the seven members approved and three members recorded their dissent individually, giving each his own reasons. General Nicolls, although he approved of the armistice: disapproved of the convention. General Pembroke approved of the armistice, but disapproved of a part of the convention.



General Moira disapproved of both. The spirit of his dissent was expressed as follows :

"I feel less awkwardness in obeying the order to detail my sentiments on the nature of the convention, because that I have already joined in the tribute of applause due in other respects to the officers concerned. My opinion, therefore, is only opposed to theirs on a question of judgment, where their talents are likely to have so much more weight as to render the profession of my difference, even on that point, somewhat painful.

"Duty is, however, imperious on me not to disguise or qualify the deductions which I have made during this investigation."

All the seven members of the court then joined in repeating,<sup>1</sup> in their second report, their respectful tribute to the "zeal and firmness" of the officers named, and the "ardour and gallantry of the rest of the officers and soldiers on every occasion during this expedition," and their opinion that such conduct had "done honour to the troops and reflected lustre on your Majesty's arms," and that notwithstanding the court's differences of opinion concerning the convention they were united in recommending that no further military proceeding was necessary on the subject. That is to say, no court-martial was necessary.

#### THE DISSENT IN THE SCHLEY CASE.

*Since each member of a court of inquiry is an investigator rather than a judge, obedience to the precept may require him to dissent from the majority's findings of fact or opinion or both. But a report from the court or from any member, whether as dissent or as an addition, upon a subject excluded expressly or by implication from the evidence or from the issues as argued, may not be based upon a thorough investigation and for that reason may be error or not, according to the order to examine thoroughly. But whether true or not, or just or not, it may be regarded by*

<sup>1</sup> Hough, c. 17.

*the convening authority or by the Commander-in-Chief on appeal as useful or as worth consideration, and hence a report not proper for a court to make and not in form or even in substance strictly proper for any member to make, may, nevertheless, be within the authority of any member, because, although not thorough, it may be within the precept and may be useful by suggesting to the convening authority that a more thorough examination is needed.*

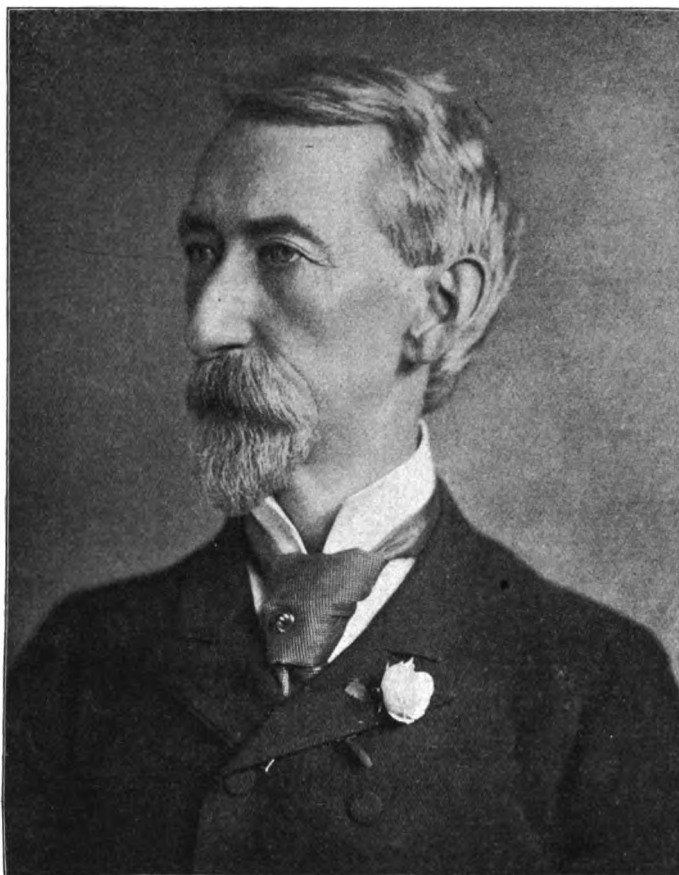
The following suggestions concerning the dissenting opinion are made upon the theory that the presiding member of the court concurred in the court's opinion excepting on the points mentioned in his individual opinion. Such concurrence is expressly assumed by both the decision of the Secretary of the Navy and the decision of the President of the United States on the appeal.

Legal readers were even more surprised than others when the presiding member of the court added to his dissenting opinion its concluding paragraph concerning the command and credit at the battle of Santiago, subjects which seem to have been excluded from the inquiry by himself as president of the court, when ruling upon questions involving those subjects either expressly or by implication. It had been supposed by some that no member of the court, even if outvoted in their private consultation, would fail to examine thoroughly or to respect, at least by silence, any interest of the Admiral to whom the court had refused the privilege of being present by counsel within the bar. Or if no such interest appeared either to exist or to be in need of protection, it was justly expected that neither its absence nor its independent existence would be subjected to any direct or indirect comment, by any member of a court which not only had the power to admit, but had exercised its power to exclude the person whom such interest

concerned. Although that paragraph concerning command and credit was so peculiar and was not approved, it gives occasion to a study of some of the difficulties of the members, who are inquirers rather than judges, of a "court" which is a board rather

plicant's appeal, establishes a valuable precedent for the individual members of military courts as to their power and their relations to the Commander-in-Chief.

It is a possible, but hardly probable, theory that this peculiar part of the



HON. JEREMIAH M. WILSON.

than a court. Such a study as applied to that paragraph serves to show that the legal treatment of it, by the Secretary of the Navy, established a valuable precedent for military courts. Also the military treatment of it by the President of the United States after the appeal as a point "raised by the president of the court," as well as by the ap-

dissenting opinion may have been the result of an opinion on the part of the dissenting member that the evidence which had been excluded should have been admitted, and that Admiral Sampson's counsel should at least have been heard. Since military judges may be arbitrary by precedent, he may have regarded himself

free to report upon such evidence as was incidentally admitted affecting the question of command, although that question was not tried and evidence was excluded which was offered for the purpose of discovering whether that question was to be tried or not. Indeed almost any theory compatible with the intelligence and character of the president of the court may be entertained after such a voluntary contribution to the unexpected curiosities of military law. But it was within the right of any member of the court to express in his minority report to the convening authority, his opinion that the evidence, or a party, had been excluded when the admission of such evidence, or of such party, had been necessary to thorough obedience in the inquiry ordered. Such minority report, if rendered, would regularly receive due consideration by the convening authority which has power to recommit the case to the court if it desires further examination. Then, if that were the course taken by the convening authority, the court would act with instructions as to its subsequent duty.

Yet the course actually taken by such a responsible officer was of course believed by him to be required by his duty under the precept. A simple explanation would be that he regarded the question of command as a necessary one, in an inquiry into the conduct of an officer of such high rank in a battle; and that he was convinced by the evidence that was admitted as to how that question should be answered, and that the mere fact that Admiral Sampson had requested to be heard and had not been permitted to take part in the proceedings was sufficiently disposed of by the fact that the court did not regard him as a party, and that the ruling that he was not a party was consistent with the evidence which convinced the presiding member of the court that the

applicant was in command. But such a begging of the question would be too simple to be competent after the evidence had been excluded. The Judge Advocate and his Assistant, Mr. Hanna, challenged a debate upon the point whether the question of command should be tried, but the challenge was not accepted by the applicant's counsel, although such a debate seemed to be imminent throughout the inquiry.

According to military law, it was not necessary for the government to grant a court of inquiry to Admiral Schley; and military law did not require such court, when granted, to enter into any hearing concerning any claim which Admiral Sampson wished to make, unless the court regarded such hearing needed in its examination as to Admiral Schley under the precept. It was a matter of course that in an examination of military movements something would appear that indicated that somebody was in command. What did appear evidently convinced the presiding member of the court that during the battle Admiral Schley was the senior officer and, as such, in command. It does not appear what the other members of the court thought on that point. Their silence suggests that they thought that the inquiry under the precept could be obeyed with more practical sense without regard even to such a fundamental matter, especially since the precept, while giving jurisdiction wide enough to cover it, did not specify it. Such a view involves, of course, the construction that the words "the entire matter" do not necessarily involve the command.

It is a mark not only of executive courtesy, but of legal discrimination in the decision of the Secretary of the Navy that, although he denies the "propriety" of making a finding and expressing an opinion on questions on which evidence was excluded, he does not deny the authority of the court, or of any

member of it, to make such a report to him. He treats that part of the report as "views" of the presiding member. His decision is in line with the principle that a court of inquiry, or any member of it, may, in addition to reporting facts and opinions when ordered, add remarks upon matters within the precept for the information and assistance of the convening authority, and as a means of fuller obedience to him, whatever decision he may come to upon them. But his implied disapproval indicates that if authority to express such views existed under the precept, it was not proper to express them after excluding evidence upon them. The decision of the President of the United States as above shown recognizes the authority as distinguished from the propriety of such expression. This is according to the statement of General William T. Sherman, quoted below, that military law belongs to a totally different system of jurisprudence from the law of civil courts. This principle of authority holds whether such a court acts in private or in public. In either case its members are confidential advisers under an order of their superior officer. The mere fact that these proceedings were public does not affect their legal character.

Publicity, so far from changing the power and duty of any member of the court to report fully to his commanding officer what such member deems to be required by the precept, the evidence, and military law, throws upon the people generally the responsibility of studying thoroughly and considering fairly such faithfulness of a public servant, whether it approves or not of such public servant's views. Government of the people, by the people, for the people, is not as easy a job in the life of any one of the people as might be supposed from the rapid judgments expressed, even with patriotic vituperation, by spectators of the court, whose sessions were

open not merely in order that public curiosity and vanity might be gratified for political reasons, but, also, for deeper reasons lasting from administration to administration throughout the existence of our government,—the reason that the people can only become sober and just judges of public servants by being trusted with the knowledge of the details of their work; the reason that the people, having the right to such knowledge, must share with its public servants the embarrassing choice whether to temporize with inevitable evils or to use radical measures to reform them altogether; and the grave responsibility of action that stirs at least one entire nation.

During the sensation over the dissent of the president of the court, it seemed to escape the attention of some writers who stood as partisans against the applicant, that the very fact that Admiral Dewey dissented, nevertheless strengthened the findings and opinions of the court in which he joined. The Secretary of the Navy, by the use of the words "full court," expresses the construction that the presiding member joined in those findings from which he did not expressly dissent. The President of the United States says "the court of inquiry was unanimous in its findings of fact and unanimous in its expression of opinion on most of its findings of fact."

Admiral Dewey's opinion that the passage from Key West to Cienfuegos was made with all possible despatch for the reason he gives, to arrive with as much coal in the ships as possible at Cienfuegos, is the only point on which he expressly differs from the rest of the court, who held that the utmost despatch was required. They held that the blockade of Cienfuegos should have been "close"; he held that it was "effective." They held that he should have proceeded from Cienfuegos to Santiago with all des-

patch; he held that he went from Cienfuegos to the point he reached, twenty-two miles south of Santiago, with as much despatch as was possible while keeping his squadron together. They did not expressly mention his blockade of Santiago as such; he held expressly that the blockade of Santiago was effective. All of these opinions of Admiral Dewey, except the first, concerning the passage from Key West to Cienfuegos, and the last, already mentioned, concerning command and credit, seem to be rather in the nature of explanations intended to give what he regarded as a just report of Commodore Schley's conduct, than to hold that such conduct was what he should have himself advised.

No one familiar with the proceedings of civil courts, and accustomed to respect and to submit to their judicial rules, can regard the dissenting member's statement concerning command and credit as other than a departure from the legal principles that govern courts of law and equity. But, since this is the act of a military judge acting under great responsibility, it must be studied with regard to military practice; and it is not wholly without precedent for a military judge, in a court of inquiry, to cut short or to exclude evidence even upon points at issue, as well as to admit evidence contrary to the rules of civil courts, as the quotations given below from General Sherman abundantly show; especially when he said to counsel offering evidence, "We have heard enough on that point."

No lawyer, as such, can be expected to advise such practice even in military courts; and the fact is, that when a military judge decides to exclude or to admit evidence contrary to civil rules, he does not usually profess to follow, even if he asks, the advice of the Judge Advocate. He uses his power as General Sherman clearly declared, but he uses it subject to disapproval by the review-

ing officer. From this point of view, the meaning of Admiral Dewey's expression may be as follows:—

Without regard to what was excluded, or to any other person or any other interest, and with sole regard to Commodore Schley's conduct and the evidence admitted, this court has the power to report, as a fact or as its opinion on the evidence, what the applicant's rank and responsibility were in the fight; and, as one of its members, the presiding member does report that the evidence before the court proves who was in command, and who is entitled to the blame or the credit for what was done during such command. And this being so, the presiding member reports the facts, his opinion, and his recommendation as to what he thinks was so proved.

The implied disapproval of this act of such a president of such a court by a Secretary of the Navy of such exceptional experience in peace and war, in legal and in military affairs, is a precedent which fixes a bell buoy, even if it does not mark a distinct advance in the legal character of courts of inquiry. It is also according to the long efforts of the Judge Advocate General of the Navy to maintain in our military courts much practical regard for the well-tried rules of civil courts. The detailed examination by the President of the United States upon the appeal, and his opinion, confirm substantially the decision of the Secretary of the Navy. The President's recognition of the point of command and credit as "raised by the president of the court" does not conflict with the Secretary's decision, which did not dispute the authority, as distinguished from the propriety, of the dissenting member to go to that extent in his expressions under the precept. The point may be fine, but it is necessary in order to understand the military system as illustrated by this case.

If it be correct that the president of the court concurred in what he did not express dissent from, then a comparison of the opinions seems to show that all the members of the court at least agreed in finding that the retrograde movement should not have been made, that the order of 25th May should have been promptly obeyed, that the "Colon," at least, should have been attacked to the utmost on 31st May, that the reports concerning coaling were inaccurate and misleading, and that Captain Hodgson was treated unfairly; but that Commodore Schley's conduct during the battle of July 3 was self-possessed, and he encouraged in his own person his subordinate officers and men to fight courageously.

If the presiding member did not join in these findings, and did not make other findings as to those points, then the question would arise whether he had obeyed the precept, which required findings as to those matters.

As to the reports of fact in the Schley case, it is not worth while here to discriminate between what the court did and what it might have done concerning each specification; because, with all due respect to the court of inquiry, it is not expected to be very precise, provided it does not ignore its orders. The late Chief Justice Field, of Massachusetts, said that, when he was made a judge, one of his friends, after congratulating him, said, "Now, don't take yourself too seriously." The value of any court of inquiry as a precedent is, not exactly, what principles did it establish, but what did it think had been done, what did it think should or should not have been done, and what did it think should or should not be done.

Consequently, dissent is far less serious, from a public point of view, than it is in an appellate civil court, where it tends to unsettle the existing law, or to invite new law.

It is interesting, however, to consider the meaning of dissenting opinions wherever they arise, especially upon professional questions where training tends towards general respect for certain standards. In this case any opinion which the eminent president of the court believed that he ought to express to the government of the country was certain to be expressed. No one can be supposed to have known better than he after presiding over such difficult deliberations, that he spoke subject at least to disapproval. He cut the cable and entered the straits of dissent with his usual fearlessness, but this time something like a torpedo went off under his flagship.

Whatever one's opinion concerning the merits of the controversy, this dissenting opinion must be said to have lacked the precaution which usually characterizes the ablest and most effective dissenting opinions—that of a full statement of reasons. The final paragraph of the opinion has been already disapproved by the reviewing officer. It introduced matters excluded in principle, as well as in some respects expressly, at the inquiry. It appears also confused, because it states incidents of rank and command, and the destruction of the Spanish ships, which might, if tried, have been more properly inserted in a statement of fact. It also adds a suggestion for credit which might, if relevant, have been more logically inserted in a recommendation, rather than in an opinion. Such an inartificial finding by such an official personage would be more surprising if we had not been initiated into the mysteries of mind by the *dicta* which one or another learned judge of the Supreme Court of the United States has occasionally let fall into an opinion, because he thought it would be good for somebody and would not hurt the country. Even if such *dicta* be true we have to bear in mind the value of the legal com-

monplace that life is too short to encourage the publication of any more of the career even of one individual, not to speak of two, than the pleadings, evidence, and rulings in the case at bar require.

It is essential to the appreciation of the expression of the presiding member of this military court concerning command and credit, to recognize the elementary principle that thereby he raised a substantial issue which exists in the conflict between the right to arbitrariness in military authority and the principles of common law and equity, as both strive for predominance in courts of inquiry. The legal question is not, was he fair or just, or wise or unwise? but, even if he was unfair, did he exceed his authority as an adviser of the government? The careful decision of the Secretary of the Navy goes no farther expressly than to hold that, in this case, the court properly refrained from making a finding and rendering an opinion on those questions on which it excluded evidence.

The President of the United States while confirming this decision of the Secretary of the Navy as to the "propriety" of the action of the other members of the court, does not deny or dispute the authority of the dissenting member to express himself as he did concerning command and credit. The President of the United States, after approving of the silence of the others in not expressing an opinion upon excluded matter, says, "The matter has, however, been raised by the president of the court." Thus he treats the dissenting member as one of three confidential advisers whose report he seriously considers as an act within such member's power whether it be strictly proper or not.

The President of the United States then continues as to command and credit as follows: "Moreover it is the point upon which

Admiral Schley in his appeal lays most stress, and which he especially asks me to consider. I have, therefore, carefully investigated this matter also, and have informed myself upon it from the best sources of information at my command." Thus the President of the United States by his action thus expressly taken to meet both the final statement of the dissenting member and the appeal of the applicant sustains the authority of a member of a court of inquiry to give advice which is not strictly proper as regards the interests of individuals but may help his superior officer by putting such superior upon inquiry to an extent beyond that undertaken by the court.

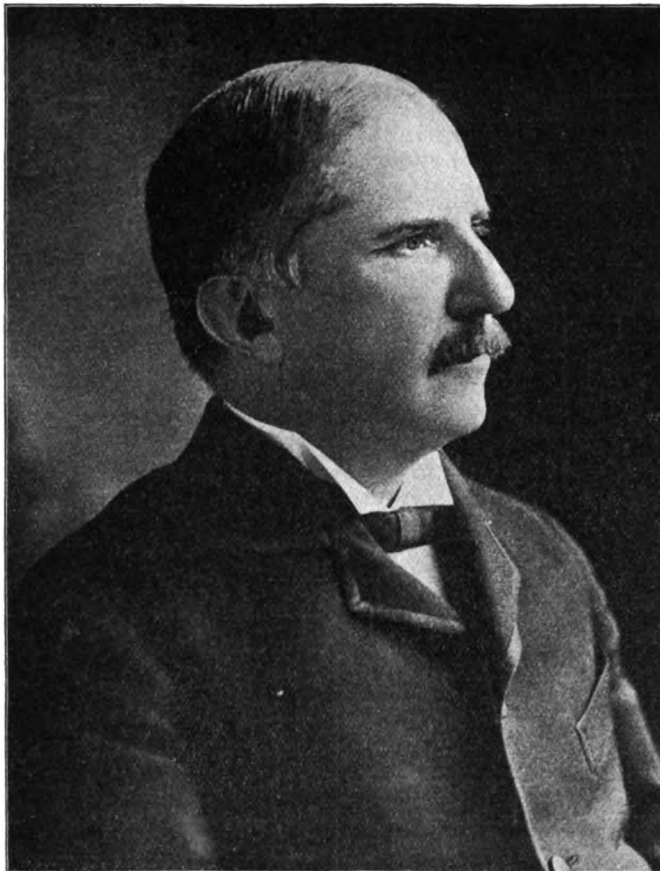
This action of the President of the United States is consistent with the fundamental principles of military power. The action of a subordinate, although not strictly proper, and although possibly unfair to some individual, is treated as useful when in fact under the circumstances of the case the superior finds it useful, even if its usefulness consists in the expression of what the superior upon examination finds to be a mistake. Advice is not helpful merely when it is taken. When it is not taken, the fact that it has been considered may strengthen its opposite.

#### ARGUMENTS FOR ADMITTING ADMIRAL SAMPSON TO THE INQUIRY WERE ESSENTIALLY BASED UPON AN EQUITABLE, AS DISTINGUISHED FROM A MILITARY POINT OF VIEW.

The court certainly had power under the order creating it to permit at its discretion, which was a trust to be guardedly used, the subjects of the command during the battle of Santiago, and the responsibility and credit incidental to such command, to be examined.

The question of admitting Admiral Sampson was not permitted to be argued by any side, and the questions of command and credit were excluded simply by the exclusion of evidence leading to them. These exclusions were made in the exercise of the military

the introduction or continuance of such evidence. The inquiry was conducted as if before the end of the testimony the question was expected to be argued as to whether command was one of the issues before the court, with a view to the introduction or



HON. ISIDOR RAYNER.

power of control granted to the court. Some evidence bearing upon command was given incidentally, but the court exercised its discretion by refusing to hear evidence which evidently introduced those matters, and even when facts tending toward them appeared in the testimony of a witness called by the Judge Advocate, the president of the court resisted

final exclusion of evidence as bearing upon it; but it was not argued.

Some of the arguments for admitting Admiral Sampson are presented below and indicate some of the difficulties which the court avoided. The review of the history of the question of command and credit by the President of the United States on the appeal,



discloses other difficulties which might have greatly prolonged the inquiry by the court, especially in open session.

It is not always safe to argue upon military law from principles unquestioned in our courts of common law and equity. More than twenty years ago, the late General William T. Sherman wrote in his pamphlet on military law<sup>1</sup>:

"It will be a grave error if, by negligence, we permit the military law to become emasculated, by allowing lawyers to inject into it principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.

"The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation." (Page 130.)

Military law is but one branch of the law enforced under the Constitution by the government of our country. It consists largely, if not chiefly, of a body of written statutes and articles and regulations, as well as of certain general principles derived from the experience of the armies and navies of the past. Some of its traditions have been greatly in need of principles derived from the practice of civil courts, and one result of the study of military law encouraged by General Sherman has been more study also of our civil and criminal law by officers of the army and navy than used to be common. One consequence of such study is improvement in the practice of courts of inquiry as well as courts-martial. Among the merits of the practice enforced by the present Judge Advocate General of the Navy is the respect paid to what lawyers regard as clear and strict and sound practice, with regard to sticking to the points at issue, and adhesion to the rules of evidence so far as the well-informed, reasonable military experts can

adhere to them with due regard to the necessities of the service and the great discretionary power of military courts.

General Sherman elsewhere says:

"This study must be pursued in hours of peace and leisure for, with us especially, wars come suddenly, when books are thrown to the winds, and every officer must carry his library in his head. That officer who knows his profession and has his mind stored with knowledge available in new and untried fields will surely carry off the palm." (P. 437.)

It may be added that it is not only wars which come suddenly with us, to test to the uttermost the brains and the professional knowledge and character of soldiers and sailors. Important duties fall to the lot of officers of the army and navy in the two responsible tasks of passing official judgment upon the conduct of their comrades, and teaching young men what the conduct and the character of an officer should be. Recent military books show that in military courts and schools the study of some of the work of great lawyers is now regarded as a part of the highest training for the army and navy.

It has been urged with reference to the court's refusal to hear counsel of Admiral Sampson, that, without disparaging the judgment of the recent court in matters upon which it made findings of fact and of opinion, it is fair to say that the chief weakness of the court as a whole, and of the presiding member in his dissent, was in not "allowing lawyers to inject into it principles derived from their practice in the civil courts." If, it is said, they had sufficiently considered such principles, the court might have appreciated the fact that under the wide authority expressly given to them to grant to others than Rear-Admiral Schley, "like privileges" to those granted to him, they were in a position requiring them to welcome, and not to exclude, Admiral Sampson as a party to the proceedings which he requested to take part in to protect his interests. They

<sup>1</sup> Reprinted from the *Journal of the Military Service Institution of the United States*. Church, publisher, New York. 1880.

were appointed by the Secretary of the Navy, upon the application of Rear Admiral Schley, to inquire into the "entire matter"; the order appointing them anticipated, by its well-chosen terms, the very emergency which arose when Admiral Sampson's counsel appeared at the bar and requested leave to represent his eminent client in a matter bound directly and indirectly to affect his present interests and his future reputation, as well as the present interests and future reputation of the distinguished applicant, whose request for an inquiry had been granted, and whose counsel urged the court to admit the very subjects upon which Admiral Sampson's counsel appeared ready to meet them.

Even the Judge Advocate, whose ceaseless cares as Judge Advocate General of the Navy may be supposed to prevent his desiring to spend more time and extra labor than are necessary in such hearings, declared substantially that if the court was willing he was ready to go into the matters upon which the counsel for both officers urged the court to hear them. But at this parting of the ways, it is said that the court took a course which was neither military when compared with leading precedents of military courts of inquiry, nor legal when judged by the wise comprehensiveness of civil courts of equity.

It is said that it was a military error to exclude evidence of command, even if all three judges agreed as to who was in command; and if they disagreed as to the historical fact, then it is said that it was a still graver error to refuse to hear evidence upon it.

Their exclusion of the question of who was in command at the battle of Santiago has been complained of as not military, because in a military inquiry concerning the conduct of an officer in battle, the fact of

his rank may determine the fact of what his "conduct" was and should have been, and may indicate his responsibility and decide the opinion of the court as to the military meaning of his conduct.

The function of a military court of inquiry, it may be said, includes great freedom, and a responsibility as great as that freedom. Its inquiry and report may be secret or open, as the reviewing power may choose. When it is secret it is because the government thinks it best, either for the government or for the nation, to have it secret. When it is open, it is because the government thinks it best, for the government or for the nation, to have it open. In either case, the government and the nation need that the inquiry be thorough, and especially when it is open does the public interest require that the inquiry should not be or seem to be arbitrarily confined within limits which are more adapted to the comfort of the judges than to the satisfaction of the people. Neither in England nor here does any class wholly govern itself or others. The army and navy are fed, clothed, armed, and equipped for service, by the masters whom they choose to serve.

The people for whom the sessions of the court were kept open could not, it is said, but feel grave when the Admiral, whose last strength was almost spent in patriotic services which at least equalled, in professional estimation, the deeds of even the most eminent member of the court, was refused a hearing because the court, which had power to hear him, did not regard him as a "party." Admiral Sampson was at Santiago, and he thought he was a party. Rear-Admiral Schley was at Santiago, and he thought Admiral Sampson was a party. But this Court of Inquiry, with powers for a worldwide examination, decided at the very outset that it knew who was and who was not a

party, or that it could prevent a party to an event from becoming a party on the record, and thereby succeeded in doing a more limited piece of work than even the party whom it regarded as the sole party argued was possible.

In these considerations, they say, it is not pertinent to reply, as might be said, that the counsel for Rear-Admiral Schley really did not regret the refusal of the court to admit Admiral Sampson, or to entertain the question of command. The point here is whether the court acted correctly from a military point of view in such refusal. The Secretary of the Navy, while approving the conduct of the court in making no finding and rendering no opinion on the questions of command and of credit for the victory, gives as a reason for such approval the fact that evidence on those questions, during the inquiry, was excluded by the court.

The Secretary of the Navy expresses no opinion as to such exclusion, having left discretion to the court. But, it is argued, while the court was right in not reporting upon what it had excluded, its work was imperfect because of such exclusion. The action of the court, it is said, cannot be said to be thorough from a military point of view. It is said that it does not appear, from the action of the judges of this court, who commanded at the battle about which it heard evidence touching the conduct of an officer whose counsel claimed that he was in command. Nor does it appear from the action of the judges of this court, that there was a victory in which the Spanish fleet was destroyed; facts which might have great influence in determining their opinion of the conduct, or of the proper treatment of the conduct of the applicant for the inquiry.

It is said that it makes no difference, from this point of view of military thoroughness, whether the claims of the counsel of the ap-

plicant for the inquiry were correct or mistaken; even if their claims were mistaken, their claims surely required an understanding of the battle of Santiago, which understanding the court could not have officially, without proof of who was in command, or of whether in any way, at any time, the command shifted, or was in any way affected, so as itself to affect the responsibility of the applicant for the inquiry.

It is urged that the Navy Department had consented to act more or less in the manner of a trustee of some at least of the fund of reputation dear to its officers, and in its order contemplated the possibility that there might be more than one applicant for the whole or parts of that fund. Wherefore its court, constituted for this one occasion only, had no more important duty than the consideration of how most thoroughly and finally to examine, and to report all facts, giving the truth about the entire matter required, together with their opinion or opinions, as to what military law and justice required them to think as judges and to recommend as advisers of the Executive.

These views with regard to the conduct of such a distinguished military court are said to be presented with the great respect due to its members, and with the belief that they expect that their official acts shall be examined with the strictness without which sincere respect cannot be shown.

#### THE EXCLUSION OF ADMIRAL SAMPSON FROM THE INQUIRY WAS AN AUTHORITATIVE ACT WITHIN MILITARY DISCRETION.

The foregoing suggestions have been made at length as they might be argued in favor of permitting Admiral Sampson's counsel to take a part in the proceedings of the court

in order to bring out, as clearly and distinctly as may be, the contrast between civil and military courts. A civil court acts because some person claims a right and asks the court to hear and decide upon that claim, and because, if the person proves such right, the court is bound to decide in his favor. A civil court has to consider the rights of persons as against other persons. But a military court acts because a superior officer orders it to act as he directs, and concerning a person or persons or affairs which he points out. When the superior gives discretion to the court, expressly or by implication, it is for the purpose of obeying such order. It is not for the purpose of deciding rights between citizens as a civil court decides them.

A citizen may demand to be heard by a civil court, and the civil court exists continuously from day to day, and from generation to generation, in order that disputes between citizens may be heard when hearings are demanded. If a civil court refuse a hearing in a case where it has jurisdiction, the citizen may by writ of *mandamus*, or a writ of prohibition, or by some other process known as extraordinary, obtain from some superior court or supreme court an order that he shall be heard. But a naval officer has to ask for a military court to be appointed to consider his complaint, and the superior whom he asks may grant or refuse his request according to the superior's judgment as to what is best for the service of the army or navy, as distinguished from what is best for that particular servant, be he high or low, in the army or navy. Then if a court is granted, for instance a court of inquiry, and the court finds in the course of its examination that some person in addition to the person whom it is ordered to inquire about is an interested party, the court may of its own motion call such person before it, and advise him that he is an interested party, and inform him that he has a right to be present and to offer evidence and to cross-

examine witnesses if he so desires.<sup>1</sup> But it does not follow that such a court has the duty of hearing any person, no matter how high in rank as an officer he may be, who thinks himself an interested party. Nor can an agreement between the person under inquiry and another make it necessary for the court to grant a hearing to that other person.

It is a familiar rule in civil courts that an agreement between parties cannot give jurisdiction. Still less can any agreement between a party and a would-be party, or even between parties, compel a military court to recognize as a party one whom it does not regard as interested, or to hear evidence upon a subject which it does not regard as needed to "throw light on the matter," as General Sherman used to say.

His characteristic language in stating the rulings of the court of inquiry concerning General Howard, of which General Sherman was president, vividly presents this contrast between the rules and principles that limit or extend the legal justice of a civil court, always open, and the customs and authority that give despatch to the business of a military court open for one case. For instance, in the case of General Howard, the Judge Advocate wished to put in some testimony in rebuttal, and said that the government had the burden of proving the affirmative. General Sherman ruled as follows:

"If the object of the affirmative be to establish the truth, there can be no objection to the witnesses; but if it be to convict somebody, then there may be some confusion. Now go on to the next point."<sup>2</sup>

Afterwards General Howard's counsel objected to cross-examining a witness on certain charges unless it were expressly noted on the record that the Judge Advocate had finished his examination upon them. Gen-

<sup>1</sup> "Forms of Procedure." Lauchheimer under Lemly. 1896.

<sup>2</sup> Court of Inquiry under Act of Congress of February 13, 1874, by Special Orders No. 35, War Department, Adjutant General's Office, of February 16, 1874, in case of Brigadier-General Oliver O. Howard, U. S. A.

eral Sherman ruled as follows: "The questions by the Judge Advocate are questions by the court, adopted for convenience, and the court holds that it has the right to renew the examination even to the last stages of the inquiry" (p. 121). As to "whether or not they are confined to the charges," General Sherman said, "the court is not limited to these eight headings of the Secretary of War."

The accused said: "Then it follows that, although the officer might be acquitted on a charge, yet he might be convicted on a specification."

General Sherman replied: "There are no charges and specifications technically before us. It is an investigation."

Later, General Sherman said: "Thus far the court has not agreed to accept his (Judge Advocate's) limiting the investigation to the collated brief which he prepared, and the court has gone on investigating the whole matter carefully, not desiring to hold the accused to any direct line of defence" (pp. 277, 278).

On cross-examination of a witness by General Howard's counsel, a question was put about a letter. The Judge Advocate suggested that if this was to be in defence then he also wished to cross-examine on it. The court was cleared for deliberation, and the court ruled that the letter could be read, and General Sherman said to the Judge Advocate: "You may examine the witness to any extent, and any questions you wish to ask you may submit to the court, and they will be put by the court if they are not objectionable. The court have the right to cross-examine at all times, regardless of rules of evidence" (p. 310).

Later the Judge Advocate said: "I object on the ground that this is new matter, and the court decided this morning that the accused must wait until the case is with him before he undertakes to prove his defence" (p. 330).

General Sherman ruled as follows: "We

are not tied down by any strict rules of evidence. It is our desire and intention to get at the truth, and if there is anything in the letter which bears upon the question under investigation, I am certain it comes within our ruling of yesterday and I so declare it. You may read the letter. The sense of the court is that anything that throws light on the subject matter it is proper for us to receive" (p. 335).

The arbitrariness, from a legal point of view, of this method of ruling on evidence appeared in both admissions and exclusions, which were not entirely consistent, if the vigorous language of General Sherman correctly explained them. For instance, upon the offer of certain papers and objections made, General Sherman said: "No harm could come; that if papers were read and found irrelevant they could be excluded." Afterwards, when General Howard's counsel offered to read the letters of a whole correspondence, General Sherman said: "They are hardly pertinent." And, still later, after a struggle between the Judge Advocate and a member of the court, concerning certain evidence, General Sherman put a stop to it by saying: "You may enter the record that the court has heard enough testimony on this branch of the case" (p. 346).

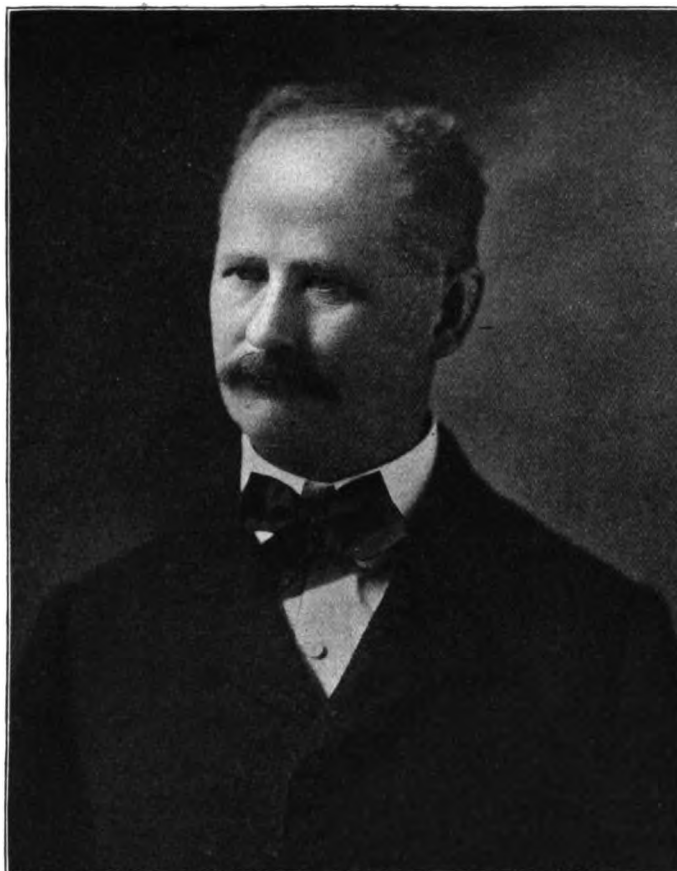
#### OPEN SESSIONS.

Whatever course a court of inquiry takes, the very fact that it is an examination almost necessarily causes discontent in some of the persons in any way alluded to in it. In a debate in the House of Commons, upon the question whether it would concur in a vote passed by the House of Lords, thanking Sir Arthur Wellesley for his conduct in the campaign inquired into, as above stated, because of the Convention of Cintra, the fact that he had signed the hated armistice was referred to, and, necessarily, the fact was considered that he had acted as a subordinate and had signed

the armistice at the wish of his superior officer, without regard to his own wishes.<sup>1</sup> Afterwards, in a debate as to whether the ministry should be condemned for misconduct and neglect, leading to the convention of Cintra, Sir Arthur Wellesley himself, who

which should ever assemble. It was not a court before which any officer would desire to be tried," and that "if he had been tried in any other manner he must have been acquitted."<sup>2</sup>

The Chancellor of the Exchequer ex-



*Copyrighted by B. M. Clinedinst, 1207 F St., Washington, D. C.*

MR. SOLICITOR HANNA.

had resumed his office of Chief Secretary for Ireland said, with reference to another member's criticism of "courts of advice" as not useful because not binding, that "he perfectly agreed with the noble lord in the wish that this might be the last court of this kind

<sup>1</sup> Hansard's "Parliamentary Debates," 1st Series, Vol. 12, 151. Jan. 25, 1809. Hough, ch. 17.

plained that courts of inquiry were resorted to instead of courts martial when the information of the government was not sufficient to warrant the bringing a distinct charge against a particular officer. Mr. Windham in attacking the ministry ridiculed the open court of inquiry as an absurd make-

<sup>2</sup> Hansard, 1st Series, Vol. 12, 935. Feb. 21, 1809.

shift to divert public attention from the mistakes of the ministry to the gallantry of the generals of the army.

A permanently important point as to the working of a government which stands out in the instances of Sir Arthur Wellesley, who was included in an open inquiry, and of Admiral Sampson, who was excluded from an open inquiry, is that howsoever much credit may be due to an officer, among the risks he takes in entering his profession is that he may have to submit to, and perhaps suffer, either real or formal injustice, or want of recognition, or what appears to be such, from the exigencies of popular interest in the government of the country, when a court of inquiry, which is essentially a confidential instrument of the government, whether it be ordered originally by the Executive, or, as sometimes happens, in consequence of a special act of Parliament or of Congress, acts in open session.

The best lesson of this is not the rapid conclusion that such inquiries should always be secret; the deeper and surer inference, for the long run, is that the soldiers and sailors of a free people must not only cultivate the bravery and strategy of war, but must learn to practise the equally difficult task of teaching their masters without flattery.

For a people, inclined, enough at least, to warfare, it is an instructive lesson in military life to get behind the dramatic scene of uniforms, flags, battleships in action, and the blaze of victory, and to see how the big and little men inside of the ships really attend to their business, and how they feel about it and each other. But such lessons are not permitted to go to greater lengths than seems practicable by the experienced officers who are responsible for the conduct of courts of inquiry.

The mere fact that a court of inquiry holds open sessions does not deprive it of its essentially confidential character and practical function. It is still an examining instru-

ment and confidential adviser of the government, whether its inquiry and report be in secret or in public. The whole nation may be listening, but the court is responsible directly to the officer under whose order it acts, and it can help that officer most by acting as firmly in public as it would in secret.

The permanently valuable result of the inquiry is the formidable lesson in discipline furnished to both army and navy. The findings of the court were not to be expected to compare with either the precision of an indictment by a grand jury or the adherence to legal principles that a master in chancery attempts.

It is a convenience for a government, especially when there is much public discussion, and the administration may be blamed by the popular voice, to have an inquiry made by such a court in public, in order that the people's interest may be gratified and their sentiments tested and directed in some measure. Then the government by a tactful use of power may try to prevent or allay irritation. The prompt action of the present administration of the United States government after the court's report in the Schley case was a signal instance. There had to be an approval or disapproval or both, and both were given. According to the recommendation approved, the Navy Department was about to concern itself no further with the case. The officer who had asked to have the entire matter passed upon by his brothers in arms, had had his request granted, and although the court as a whole did not pass upon all that his counsel may have desired, the dissenting opinion covered some of that.

#### THE APPEAL AND THE MEMORANDUM OF THE PRESIDENT OF THE UNITED STATES THEREON.

By appealing to the President of the United States the applicant revived the ques-

tion of command, but subjected his whole case to a private examination and to a more summary treatment. Yet the remarkable fulness of the President's review and the impartiality of its spirit prove an openness of mind which adds force to his distinctions between military law and popular views of the situation. He has lifted even the popular discussion out of the mere wrangle about glory. Although the President's memorandum is adverse to the applicant upon most points, it improves the legal position of the applicant and of the dissenting member of the court by treating respectfully the question of sufficient expedition because of sailing in squadron which was raised by the dissenting opinion. The President says: "I feel that there is a reasonable doubt whether he did not move his squadron with sufficient expedition from port to port."

The President also gives to the applicant a credit which, although critically guarded, is very different from the abuse on account of which Rear-Admiral Schley applied for the inquiry.

The President takes no notice of the statement in the letter to him dated February 6th, 1902, by the counsel for Admiral Sampson that "we are confident that an attempt to pronounce an adverse judgment where a hearing has been denied is so plain a violation of simple good faith that it has no chance of receiving your approval." This bold attempt to prevail against a member of a military court by an allegation which would hardly be ventured against a judge of a civil court, except with a view to his impeachment, and the fact that it has been simply ignored by the President, illustrate the extreme informality to which a court of inquiry may lead by its inconclusiveness. The President's silence concerning such an allegation is distinctly military as well as politic. It also tends to sustain the authority of a dissenting member to act arbitrarily under military law.

Nevertheless, the counsel for Admiral

Sampson, although not permitted by the court of inquiry to make any statement before the court, succeeded in having their statements in writing received and recognized by the Secretary of the Navy, and received, pending the appeal, by the President of the United States. The President treated their eminent client's claim as *res judicata*, and his despatch charging Commodore Schley with "reprehensible conduct" as so late as to suggest condonation if not laches.<sup>1</sup>

#### CERTAIN DETAILS CONCERNING THE EXCLUSION OF ADMIRAL SAMPSON.

The rulings above mentioned in the case of General Howard may help the reader to appreciate the proportion which necessary authority over an army or navy bears to the claims of individual members of either branch of the service in military courts, and may throw light upon some of the following proceedings in the case of Rear-Admiral Schley. They are not exhaustive, but are given to indicate the methods used.

Mr. Rayner asked questions as to the time when the Spanish vessels went ashore, saying, when asked, that he did so to show the position of the "New York," Admiral Sampson's flagship, on the day of the battle. After a discussion this line of questions was

<sup>1</sup> Their letter ran as follows:

"30 BROAD ST., NEW YORK CITY, Feb. 6, 1902.

"HON. THEODORE ROOSEVELT, *President of the United States*,

"Sir: We beg leave as attorneys for Rear-Admiral W. T. Sampson, and on his behalf, to submit the following statement in connection with the petition of Rear-Admiral W. S. Schley, asking relief from his condemnation as reported by a Court of Inquiry and approved by the Secretary of the Navy. . . .

[Here followed a forcible statement of their claim.]

"We have no desire to prolong this controversy. We only ask that before there shall be a finding adverse to Admiral Sampson, either by the President, the Courts, or the Navy Department, that he be given the opportunity which has been given to Admiral Schley to present such evidence as may make both sides of the matter clear.

"Very respectfully,

"STAYTON & CAMPBELL and

"E. S. THEALL,

"Counsel for Rear-Admiral W. T. Sampson."



abandoned for the time, being postponed until a witness might know more about the matter.

The applicant's counsel offered a statement from a magazine article, purporting to have been written by Admiral Sampson, which, after discussion, was withdrawn. Then the witness under examination in answering a question said: "That was the day that Admiral Sampson told me that his information said it [the Spanish fleet] was there" [at Santiago].

At this point Mr. Stayton appeared in behalf of Admiral Sampson, and handed a communication to the court. The president read it and said that they would answer it later, and that pending the answer Mr. Stayton could not remain within the bar, but could remain outside, that is to say, not taking part in the proceedings. Thereupon Mr. Stayton withdrew. Upon the close of the testimony of the witness then on the stand, the Judge Advocate read the communication from Admiral Sampson which requested leave to be represented.

The Judge Advocate advised the court that Admiral Sampson was not a party, and that the court had discretion to admit or exclude his representative. Counsel for the applicant attempted to address the court, but was stopped by the Judge Advocate, who said that counsel could not be heard, that the matter was entirely for the court. Whereupon the court decided that "they cannot appear," and instructed the Judge Advocate to reply to that effect to Admiral Sampson. Mr. Stayton again asked leave to address the court, but was promptly stopped by the president. The Judge Advocate read aloud the reply to Admiral Sampson, stating that the court "does not at this time regard you as a party."

Later, counsel for Rear-Admiral Schley inquired, "Did you mean to include the subsequent vessels that went there under Admiral Sampson?" This question, while legitimate for the purpose of clearness, seemed

to be intended to emphasize the fact that the applicant was not the only commanding officer who omitted to use every effort to destroy the "Colon" before the final battle.

Mr. Rayner offered to prove that the blockade by the applicant was the same as to distance as that by the commander-in-chief after his arrival, also that the commander-in-chief failed to do his utmost against the "Colon" when he arrived and found her at the mouth of the harbor. But the court excluded both matters as irrelevant to the investigation concerning the applicant.

Mr. Rayner asked a witness "when the circular form of blockade was commenced?" The Judge Advocate objected. The court took a recess and, upon returning, the president said that questions upon the blockade of Santiago must be confined to the time before the arrival of the commander-in-chief.

When Mr. Rayner asked a witness whether smoke near the harbor of Santiago on July 2 was communicated to the squadron, the Judge Advocate inquired whether that concerned the conduct of the applicant.

Mr. Rayner stated what he wished to prove. Whereupon the Judge Advocate said that if counsel does that he should be sworn. Afterwards the Judge Advocate consented to the questions being asked on condition that counsel would "stop at once."

The witness answered as to smoke having been seen on July 2, and that it was his "impression" that the fact was communicated to the commander-in-chief, Admiral Sampson.

A question by the applicant's counsel as to what vessels were in sight at the beginning of the battle was objected to by the government as not in the specifications, and was withdrawn for "the present."

Before the cross-examination of the applicant by the Judge Advocate, the court ruled that questions be confined to the time between the 19th of May and the 1st of June, when he was actually commander-in-chief. The court said that if there was delay be-

tween Key West and Cienfuegos this witness (the applicant) is better qualified than any other witness to give reasons.

The Judge Advocate offered the report of the "New York" (Admiral Sampson's flagship), but counsel for the applicant objected in so far as it attempts to bind the applicant to certain facts; for instance, its undertaking to state the position of the "New York" in the battle, because, said Captain Parker, "We have not been permitted to offer any evidence in respect to that."

The Judge Advocate withdrew his offer of the report.

Mr. Rayner asked a witness whether he saw signals from the "New York," and gave as his reason for asking it, that it was to show the "conduct" of "anybody." This was probably bearing on the command during the battle, but upon objection, Mr. Rayner withdrew the question for the present, saying he thought it admissible.

#### THE COMPLEX TASK OF THE JUDGE ADVOCATE.

If in order to understand the conduct of Commodore Schley it had appeared necessary to go so far into an examination of acts of Rear-Admiral Sampson as to affect his interests, the court probably would not merely have admitted him as a party, but might, of its own motion have notified him that it had become necessary that he should become a party.

It is essential, however, not merely to know the power of the court in principle, but also to appreciate the practical task of the Judge Advocate in preparing and conducting the inquiry. It is not one of his arduous duties to become a historian of a war. He is to examine the conduct of the person about whom the court is appointed to report, and incidentally he may be required by the court to extend such examination if, as above stated, it is deemed necessary. But one reason for not extending his

task unnecessarily is that he may have to present both sides of the case to the court, as would happen if the person examined had not competent counsel. Counsel are permitted, but the court has discretion as to whether, and how far, they shall be permitted to appear and to speak.

In the case of General Howard:

At the beginning of those proceedings General Howard personally asked the court to permit him to have counsel to address the court.

General Sherman replied, "I think it would be advisable for yourself to do that." But later counsel were permitted to examine and cross-examine and argue.

In the subsequent case of the Proteus court of inquiry<sup>1</sup> Lieutenant Garlington asked leave for his counsel, Mr. Kent, to speak, and Mr. Kent in his argument expressed to the court "my grateful acknowledgments for the courtesy which has extended to me the privilege of appearing before you in behalf of Lieutenant Garlington."

It is also important to remember here, what is too often forgotten elsewhere in criticisms of trials by Attorneys General, where they are accused of not remaining permanently "judicial," that the Judge Advocate's duty of impartiality is limited according to circumstances. If he has to present both sides of a case because the accused or the applicant is unable to present his case or has not competent counsel, then his controversial powers are subject to his judicial function, to the largest extent compatible with a forcible presentation of facts necessary for the government to possess if against the accused or the applicant. But when the accused or the applicant has able counsel, the Judge Advocate may even need assistants properly to maintain the position with which the position of the accused or the applicant must be compared, and perhaps attacked. In such

<sup>1</sup> The Proteus court of inquiry on the Greely Relief Expedition of 1883.

cases, the Judge Advocate's judicial powers, after the preliminary preparation has had the benefit of his best and fairest judgment, are hardly required to be exercised, excepting when the court asks advice. He is comparatively free to act as an advocate as against the counsel of the accused or the applicant, because thus only could there be examination and cross-examination worthy of the attention of any competent court. In an important case it is better for both truth and justice, as well as law, that the evidence for each side should be presented under the guidance of clear-minded and skilful counsel, and that the arguments should have the precision and power which make advocacy useful before judges who are thus informed, and warned, also, against extremes in their own minds, before bringing their minds to a decision. Such was the situation in this case of Commodore Schley, and, therefore, it may be studied by lawyers, not as a criminal case between the government and an accused person, but as a controversy to which the applicant had invited the Navy Department, and in which the applicant, by able counsel, required the Judge Advocate to act as an advocate in order that the court might obey the order of the Department to go into "the entire matter."

Yet such advocacy by the Judge Advocate remains, nevertheless, a part of the court's own action "adopted for convenience" as General Sherman pointed out. It preserves the responsibility of a prosecuting officer before a grand jury to advise it, and before a petit jury to convince it. It is a complicated peculiarity of the position of Judge Advocate that he combines in his official function so many powers with so many conflicting duties. The reason is that a military court is intended to serve as nearly as possible in place of the mind of the commander-in-chief himself, who, if he had time to do everything, would examine doubtful or disputed cases, with

such methods and intelligence as the information and skill of the several professions might furnish him with. He would sometimes use, and often abandon, formal methods according to his sense. He is not bound by the rules of exclusion which control evidence in civil courts or by rights of parties necessary in courts of equity. The methods taken by the President of the United States to form his opinion on the appeal as described in his memorandum on the case illustrate this military practice.

#### BIAS INEVITABLE IN AN EXAMINATION BY COUNSEL ON OPPOSITE SIDES.<sup>1</sup>

Parties are permitted to have counsel in courts of inquiry, and competent counsel know by experience that it is impracticable to adopt any but a controversial method where two opposite theories are to be submitted, from the start, to judges by opposing parties and witnesses, at public hearings of which a complete record is to be made and preserved. Yet even some of the advocates in this case occasionally yielded to the influence of the ideal which haunts trustful minds, that a fight can or should be carried on disinterestedly—at least by the other side. The Judge Advocate complained of "interruptions," until Mr. Rayner reminded him that "objections" was the word to describe his suggestions.

Then Captain Parker in his argument seemed to complain that the specifications of the precept were "charges" against the applicant, as if the applicant had not

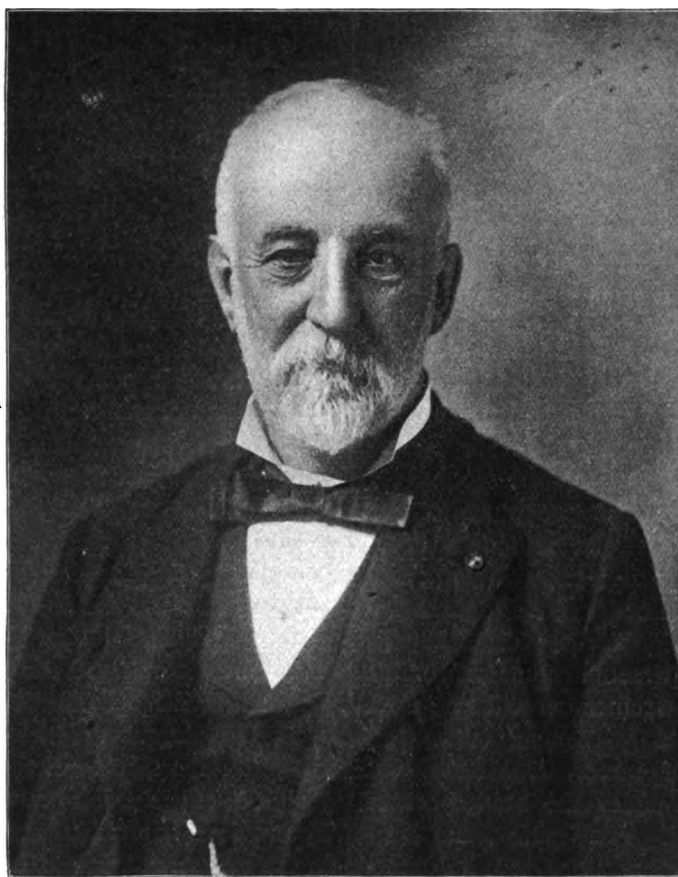
<sup>1</sup> Something far lower than mere bias is recorded of naval writers of an earlier time by Colonel Roosevelt, President of the United States, in his chapter on "The War with the United States, 1812-15," in the sixth volume of "The Royal Navy" by Wm. Laird Clowes, assisted by Sir Clements Markham, Captain A. T. Mahan, Mr. H. W. Wilson, Col. Theodore Roosevelt, President of the United States, E. Fraser and others, where he says, "One of the tricks of the naval writers of the period, on both sides, was to compute the tonnage differently for friendly and foreign ships, thus making out the most gratifying disparity in size for the benefit of national vanity" (p. 25).

asked for an inquiry because of criticisms or libels about which, now that he had asked, the government wished to be specifically informed. These materials were put into shape for clear examination under the practice of such courts, by pointing out in the

sides of what is called, for want of a better name, an "Inquiry." Here is the usual simplest instance of a witness on his guard.

On cross-examination of a witness called by the government, Mr. Rayner asked,—

"Have you discussed this (referring to a



CAPTAIN JAMES PARKER.

precept what the government considered it especially worth while to have reported upon by the court.

It is idle to imagine that such a case can be tried without bias, and no better illustration of the substantial fairness of our trials in common law courts can be found than in the exhibition of what the late Mr. Justice Stephen called the "subtle partisanship" of the "experts" in this trial. It was not the counsel merely who were evidently on opposite

certain matter in evidence) with anybody since this court of inquiry?"

The witness answered, "I think I have, in fact, I know I have."

"With whom?"

The witness said to the Judge Advocate, "Do you want that question answered?"

Judge Advocate, "Yes, of course."

Answer, "With the Judge Advocate General of the court."

"Any one else?"

Answer, "I think with Mr. Ward," mentioning the officer who was assisting the Judge Advocate.

If this conversation had taken place in one of our court rooms, where it is not the practice to profess to believe that every witness is trying as hard as he can to tell the truth, the whole truth, and nothing but the truth, it would be regarded as a moment of truthful bias, but nevertheless of bias guarding the point of those confidential communications, which take off the bloom of the really fresh fruit.

There is no self-deceit more complacent than that of professional gentlemen, who dream that their right to be believed is as great as their desire to tell the truth. In this case there was much honest protestation of the truthful proclivities of the witnesses, and their mutual contradictions were explained as errors resulting from imperfect observation or defective recollection. That was doubtless the proper course to take in living up to the tone desired upon such an occasion. But it is necessary to look beneath the surface in order to distinguish between the knowledge of the witnesses and their respective personal equations. The essential point to be remembered is that even the testimony of a gentleman, trained to high standards of honor, is affected by preparation made under the honest art of honorable counsel. The same man honestly telling the same story tells it differently when led by different counsel. This is not merely a thing to be regretted, it is a thing to be understood. Men of business experience realize, as few other men do, that an honorable gentleman is as sensitive about being believed after he has had his attention called to some mistake in his testimony as he was strenuous in insisting on its original correctness.

After the trial of Admiral Keppel, Vice Admiral Sir Hugh Palliser, who appeared to be active against Admiral Keppel, was tried by court-martial. The court acquitted

him of misconduct or misbehavior, and said that his conduct in many respects had been highly exemplary and meritorious, but added that he should have made certain facts known to his commander-in-chief.<sup>1</sup>

#### INGENUITY A USUAL INCIDENT OF ADVOCACY.

The need of distinguishing between the actions of an officer whose duties and powers require him to advise the court, and also to represent the government in the trial of a case appeared early in this investigation.

The Judge Advocate asked of a witness, "What impression did the Commodore's manner make upon you?"

When the counsel for the applicant objected, the Judge Advocate replied, "I got that idea from a question put by Mr. Rayner to the witness the other day." To which Mr. Rayner responded, "Not on such a subject as this." Thereupon the Judge Advocate withdrew the question, and asked concerning the applicant's manner. The answer was, "His manner was that of a commander-in-chief." The Judge Advocate then asked again for the witness's impression, and was again checked by an objection.

In such target practice as trying to hit the bull's-eye in the minds of a court or a jury, the experienced practitioner is warned by previous failures of unsophisticated trust in the natural and immediate appreciation of the merits of his client or of his cause. He finds it expedient to remember that testimony is not discharged into a vacuum, but into a medium subject to the winds of prejudice. Hence, unless he uses some ingenuity, he may not even strike the minds of his judges at all.

The Judge Advocate asked an officer to state the features of the blockade which may aid the court in determining whether or not it was an effective blockade. One of the ap-

<sup>1</sup> Court-Martial published with that of Keppel. See below.

plicant's counsel objected that this was "very adroitly put," and hence the question was changed.

The applicant's counsel were not to be outdone in ingenuity. They asked, with regard to the movement on May 31: "As a matter of fact, treating it as a reconnoissance, was it not a success in finding out and developing things not known?"

The Judge Advocate said "that you cannot make an opinion a fact," but he did not object to the question.

An entertaining episode was when, in cross-examining a witness as to the weakness of land batteries when the "New York" passed them during the battle of July 3, Mr. Rayner asked, "You stand to your opinion?"

The president: "We do not want opinions."

Mr. Rayner: "I did not know he had given me an opinion. I thought it was a fact to which he was testifying."

#### EVIDENCE OF OPINION.

Notwithstanding the court's authority to admit or exclude evidence at its discretion, the clearness and constant progress in the examination of the witnesses proved the value of the assistance of lawyers experienced in the application of our rules of evidence. It required some pains and a good deal of energy to lead the court to an appreciation of such criticism, but after the first part of the examination, a discretionary mode of operation was practised which was sensible. The most interesting part of the rulings of the court upon evidence was concerning questions to experts concerning their opinions, and the answers of experts involving their opinions. So many theoretical lectures are given to lawyers and to the public, especially by scientific experts, as to how much better it would be for the ascertainment of truth if experts were exempt from the rules of evidence requiring them to stick to the

questions asked them, and subjecting them to cross-examination, that it was fortunate to have here an opportunity to observe how a cloud of witnesses, experts before a court of experts, managed to unload their conflicting memories, their understandings, and misunderstandings.

In such company the Judge Advocate deserved the sympathy as much as he earned the appreciation of the legal profession. He had to ask questions calling for opinions, defend them against objections, and, nevertheless, advise the court that, while they had the power to admit any questions and answers, the weight of authority was against some of the questions which he asked. For instance, the court through him asked, "Was every effort, incumbent upon the commanding officer of a fleet under such circumstances, made by the applicant to capture or destroy the "Colon" as she lay at anchor in the entrance to Santiago harbor, May 27 to 31, inclusive?"

The witness replied, "No, I don't think it was."

The answer seems to have been given before the objection was made, but upon objection made by the applicant's counsel, that the question called for the witness's opinion, the president said: "You cannot object to our questions."

Whereupon the applicant's counsel argued that a court of inquiry was composed of experts who were to give their own opinion upon facts which they should find, but were not to hear even the opinions of other experts.

After citation of authorities and discussion, the Judge Advocate said, "I believe the weight of authority in a case of this kind is against asking the opinions of witnesses; but I want to advise the court that they are entitled to the opinion of any witness if they desire it."

The court then withdrew the question.

The importance of the objection appeared from the answer already stated, which was,

"No, I don't think it was." This, of course, was disposed of with the question.

In this connection it is interesting to compare the answer given, and then excluded, with that given by Lord Mulgrave at the trial of Admiral Keppel. Lord Mulgrave declined to answer a question as to opinion. The following question was put to him: "To your knowledge and observation did Admiral Keppel negligently perform the duty imposed on him on the 27th or 28th of July?"

He answered: "I have taken an oath to answer the truth to all questions; I look upon opinions to be matters liable to error; I have answered every fact that has come within my knowledge as distinctly as I could; I hope the court will not press upon me to give my opinions. I have always thought that the opinions and thoughts of individuals were sacred; I have declined, to my most intimate friends, giving any opinion upon this case; the court, who are to form their opinions upon the evidence, take an oath not to divulge each other's opinions. I hope the justice, candor, and reason of the court will extend that protection to me, which the law has given to them, and that I shall not be called upon to give any opinion. The court are to judge of the facts before them, and I should think myself in a most disagreeable situation as a witness, if I am to be called to answer, upon my oath, to that which is matter of opinion; and, perhaps, after giving it to-day, at another time I may alter my opinion, and think it not a just one. The facts I can speak to as matters of knowledge—as to opinions I cannot."

When urged, he said: "The term negligence implies a crime. I must be equal to the duty of an admiral commanding in chief, before I can decide, upon oath whether he did his duty properly or not. It is for this court to decide that, and not for me. I have answered the facts, and, if I am to be urged more by the court, it is not the Admiral accused, but it is me that they are trying, because I am to form an opinion how that

fleet was to be conducted, and not the man who commanded it."

The court in that case retired, and after deliberation decided that the question should be put to him again, but that for the reasons he had given he might answer or decline to answer. The question was accordingly put, and he declined to answer.

In the Schley Inquiry, sooner or later however, some such answer was to be expected to be got at by dint of skilful questioning, and the assistant of the Judge Advocate asked a subsequent witness,

"What was left undone to destroy the 'Colon'?"

Mr. Rayner objected that the question should be restricted by reference to certain regulations, and it was accordingly modified by instructions to the witness, who answered, "The whole force was not used on a defined plan."

Not content with this advantage, Mr. Solicitor Hanna asked a question which brought out one of the limitations binding even experts when they happen to have military responsibilities added to their knowledge of the art of war. "Why was that important?" he asked. Upon objection, the question was withdrawn, and the president said that "questions calling for the opinion of a junior on the action of his superior ought not to be asked."

Almost inevitably, the "belief" of this and that officer, as to the whereabouts of the Spanish fleet before it was discovered, was testified to. But an objection to a question asking for this was afterwards sustained.

Questions not directly reflecting upon a superior were permitted, for instance, as to the "strength" of the land batteries in a bombardment of June 16.

The government went even so far as to ask for an opinion involving an argumentative answer.

An officer who had feared a collision between two vessels of our fleet, the danger of which was disputed, was asked when his

vessel was in the greatest danger in the battle.

The court admitted the question<sup>1</sup> as to danger, although the applicant's counsel argued that it called for opinion. Mr. Solicitor Hanna ingeniously argued that such admission was a necessary exception to the rule as to opinion.

Notwithstanding the responsibility of the Judge Advocate to advise the court when there was dispute as to methods, he found the same practical needs that drive even Attorneys General to questions leading in substance, although wrapped in their formal alternative. For instance:—

"Confining yourself to facts, was his (the applicant's) manner nervous or not?"

Upon objection, the president said, "That is a proper question;" but the court excluded a question as to whether the applicant was afraid to take responsibility.

The general but not constant course taken by the court, in admitting or excluding questions calling for the opinions of a witness on the stand, seemed to incline to the exclusion of questions which tended to put too great a strain on the conscience of a witness in view of his possible partisanship, subtle as it might be; or which led too directly to categorical answers as to controlling issues concerning the conduct of the applicant, and to the exclusion also of questions which invited a witness, of a possibly too swift temperament, to express an opinion when it appeared that he had not the facts upon which to form it. For instance:

The court excluded the opinion of a witness as to whether, from observation, a vessel could have made greater speed,

<sup>1</sup> The importance of this ruling upon a single question is shown by the words of the President of the United States in his memorandum upon the appeal where he quotes the words of the court "dangerous proximity" to the Spanish vessels, and says: "It was not in my judgment as great as the danger to which the Texas was exposed by the turn as actually made." This is according to the answer of the witness under the said ruling. If this ruling is according to the rule laid down by Benet (see note below) it is probably near the line of questions which should be excluded, unless it is an exception. The line does not seem to be very clear.

since it was not shown that he knew her sea speed, and was not on board of her.

But questions calling for opinions which seemed to be necessary to inform the court completely<sup>2</sup> of the facts in evidence were admitted, with the occasional exception of inquiries pressing for criticisms of officers superior in rank to the witness.

Many questions which were asked were upon objection, withdrawn; for instance, as to "anticipating difficulties", and as to the "purpose" of a memorandum. Argumentative questions, leading in form and substance, were asked by the government. For instance: The government asked whether there were shoals or other obstacles to prevent boats approaching the mouth of the harbor, so as to be within easy range of the "Colon" when she was there. Against objection this was admitted.

#### HEARSAY EVIDENCE.

The court seemed to take judicial notice of the regulations of the navy and of squadron regulations, and after the logs of vessels had been put in by consent, the president cut short testimony concerning their contents by saying, there is no need of asking the witness, "because the log-books are now in evidence."

This somewhat wholesale treatment of log-books reminds one of the opposite view stated in testimony in the court-martial of Admiral Keppel by Captain Alexander Hood of the English ship "The Robust," about his own log-book: "I do not think, God knows, that log-books which are kept in the manner that ship log-books are, ought to be implicitly taken as evidence. They serve to assist the memory."<sup>3</sup>

<sup>2</sup> Benet lays down the rule that every question is admissible of a military man, when founded on local knowledge or circumstances not within the reach of all the members of the court; for instance opinion as to the exact execution of a certain plan of operations. But a question merely of military science is for the court to try on the facts. See *Benet's Military Law*.

<sup>3</sup> Court-Martial of Hon. Admiral Augustus Keppel, as to his conduct against the French on July 27 and 28, 1778.



A witness on cross-examination was not permitted to read from the log of another vessel.

The court was careful to prevent the reading of editorials and newspaper clippings which happened to be referred to by letters without being enclosed in them. Yet an officer was permitted, when testifying as to the range, to say that he heard battle messengers call out the range to turrets, and inform people standing by, and said, "I would have fixed my gun by it, though it was not given me officially."

A newspaper reporter was permitted to read from his notes, memoranda of the ranges heard when given.

A good deal of matter concerning others than persons concerned with the inquiry as conducted had to be excluded, just as evidence concerning Admiral Sampson was excluded, such as a statement by one officer, a letter of another officer to the Secretary of the Navy, a "hail" from one vessel to another not in hearing of the applicant, and conversations out of his hearing.

Attempts at indirect cumulative proof were made by the government, such as reading from a Spaniard's book which the applicant's counsel had read from, and asking whether that corresponded to the fact as to the ships withdrawing at night. Captain Parker objected.

#### CROSS-EXAMINATION.

The government asked a reporter why he did not say in his story in his newspaper what he said in the court of inquiry as to the closeness of the "Texas" to the "Brooklyn." The applicant's counsel objected, and said the newspaper should be produced and his reasons were not wanted. The court admitted the question.

The practice as to examination and cross-examination appeared when the applicant's counsel stated that they also had intended to summon a witness already summoned by the government. The Judge Advocate con-

sequently said that he did not wish to confine counsel to cross-examination on what was brought out on the direct examination. The president said, "The court wants the facts, no matter when it gets them." When Mr. Rayner reached, in his cross-examination, the matters which he wished to go into beyond the direct examination, the Judge Advocate reminded him, and Mr. Rayner changed from leading questions to the form of a direct examination. The applicant's counsel, on the cross-examination of a witness who was a member of a board to examine the Spanish wrecks, read from the report of that board, and questioned the witness with reference to it. The Judge Advocate insisted that the report be put in evidence, and that the witness examine it. It was put in, and Mr. Rayner asked the witness to examine it, and with it a statement made by the applicant. The Judge Advocate objected, and also said that it did not belong to cross-examination. Mr. Rayner said that now he was examining the witness as upon a direct examination. The Judge Advocate did not object to that. Finally, the witness, by consent of counsel, in order to get at material for an answer, figured on the papers presented for his examination.

Mr. Hanna on cross-examination asked a witness whether he had not stated otherwise in the ward-room. The president objected unless the applicant was present, and asked for authority as to the admissibility.

Mr. Hanna appealed to the applicant's counsel, who admitted that the question could be asked on cross-examination. There was much argument as to whether the witness's answer could be contradicted. Mr. Hanna took the point that the purpose was not merely to contradict the witness, but to prove his conversation with the applicant. The court acted in accordance with the view that it is largely discretionary<sup>1</sup> and excluded contradiction.

The court's advisers, in cross-examining

<sup>1</sup> See Chamberlayne's note in his edition of "Best on Evidence" (1889), on Contradictory Statements, p. 633.

a witness, asked about some previous statement of his. Upon objection, the court required that time, place, and individuals should be stated in such a question, in order that the witness might know about what he was being examined. The president, in making this ruling, said, "We know more law now."

### THE COURT'S ATTENTION.

The record indicates that the witnesses received constant attention from the court. The court's attention was shown when the government asked a witness concerning signals, "Did they excite comment on board the ship?" The president said, "What is the use of these questions? It seems to me we are taking up time for nothing."

Later, a witness was asked, "Did you deliver the despatches?" He began to answer, "I took them," when the president said, "You have not answered the question."

Again, a witness testifying as to the weather stated the force of the wind. The Solicitor said, "You need give only the direction." The president said the court would like the force also, that it was very important.

The president, with reference to coaling, asked an officer, "Did you say that Cape Cruz did or did not look like a favorable place?"

A witness said, "I believe" so and so. The court said his own knowledge was what was wanted.

### THE COURT'S CONTROL.

The court's control of both sides and of the whole proceedings appears from the following instances:

The Judge Advocate asked a witness, "How old are you?" The president said, "That has no bearing." The Judge Advocate asked the witness how long he had been in the service, and the question was answered.

A witness said, with reference to a vessel, "I assumed" her tactical diameter was so much. The president said, "We don't want that."

The Judge Advocate on cross-examination of a witness, asked him whether he had not made some mistake in service at Newport. The president ruled this out—"Whether there is law on it or not," since the court had discretion.

The applicant took the stand. In the course of his testimony he said, ironically, that as "evidence of promptness a despatch dated May 27 did not reach him until June 10." The president said, "Just state the fact. It is not worth while to criticise anybody."

The applicant then said, with reference to the commander-in-chief, "I never had any difference with him, and never——" The president said, "I would not go any further."

The chief boatswain on the "Brooklyn," when testifying to the applicant's conduct during the battle of July 3, when others were naturally dodging shells, said that the applicant's "head never bent." At this, there was applause. But the president said, "No, no demonstrations here."

The Judge Advocate asked a witness, "Have you ever said that there is no doubt that the applicant was worried and afraid to take the responsibility?" The witness replied, "I said that in my own private notes, my diary, as my opinion at the time."

The president said that the question was proper, and the answer was, but went a little too far.

The court ruled that a witness can be called and recalled, to make correction or additions at any time, but "not to reiterate."

The president's control of the trial was shown when the Judge Advocate interrupted questions which were being put by Mr. Rayner to a witness. The president said: "I would rather you would not interfere with this examination. . . . If counsel put words into the mouth of a witness you can bring it out at the proper time."

The Judge Advocate urged that this is the advantageous time, but the president stopped the interruption.

#### SOME TIME IS REQUIRED TO INFORM THE COURT OF LEGAL VIEWS.

Much time was consumed by legal arguments about rudimentary principles of evidence, and of the treatment of witnesses, with the result of not getting very clear rulings. Now the Judge Advocate does the hard work of a presiding officer by advice without having the power to use despatch upon such simple matters as the following: After argument the court ruled that questions intended to impugn the credibility of witnesses to prove positions at the battle of July 3, or statements made by the applicant or conversations with him are admissible from one who was present, if material.

Mr. Rayner began to cross-examine a witness as to a despatch from the applicant to the Navy Department.

The president asked, "Was it sent?" and upon its appearing that it was taken to the cable office but not sent, the president said, "It ought not to appear," and declined to argue the question when Mr. Rayner asked the court, "Suppose it was not the fault of the applicant?" The president said, "You cannot ask us questions. We are not in the witness box."

#### POINTS OF PRACTICE.

Counsel agreed with the Judge Advocate that according to the proper practice in courts of inquiry, questions and answers although excluded, should not be struck out of the record, because the record should contain all the proceedings. Of course, this adds to the value of such records for the purpose of precedents of practice.

The Judge Advocate arranged such matters as the following: he requested that the

testimony be not read to a witness by the stenographer, but that the witness be ordered to report the next day at the opening of the court when he could be furnished with a part of the record containing his testimony, and be asked to withdraw for consideration of it. On completion of it he would again be called before the court and be given an opportunity to amend his testimony as recorded, or to pronounce it correct. This was granted.

But a witness who wished to go away and not return was permitted to have his testimony read to him by the stenographer before his departure.

The Judge Advocate suggested that it would be convenient to adopt the following practice upon objections: first, objection and argument by the objector; then reply; then objector to close. The counsel agreed upon this method.

The Judge Advocate, while a witness was on the stand, offered to suspend his examination and to examine another witness with reference to differences between original papers and copies. Mr. Rayner objected that a witness was on the stand. Then the Judge Advocate admitted there might be objection "if this had not gone out to the public." He added that he had known it to be done frequently in courts-martial and courts of inquiry. The president asked, "Is there any law on this subject?" The Judge Advocate replied, "Nothing but the practice." Mr. Rayner asked for a precedent, and urged that it was important with a view to cross-examination that such suspension should not be allowed.

The Judge Advocate said he could look up one. Mr. Rayner said that he had tried one court-martial case, and that such suspension would be contrary to the principles of common law practice which were regarded in such cases. His objection was sustained.

As so often happens in trials, not long afterward Mr. Rayner wished to suspend the examination of a witness, in order to intro-

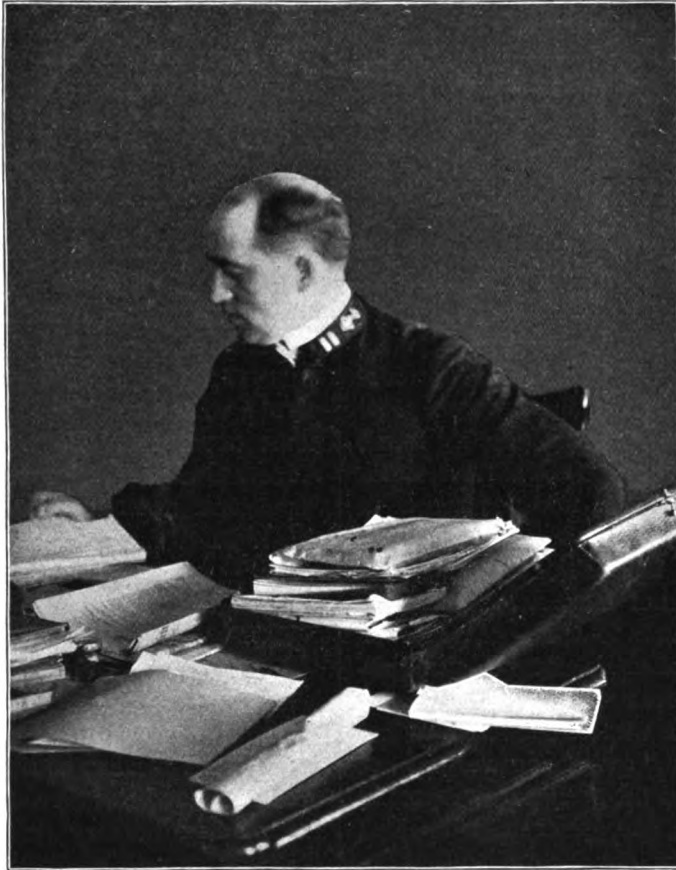
duce certain evidence for convenience, and convenience was yielded to.

While a witness was on the stand the applicant's counsel was permitted to put in a paper as to computed speed.

There are many apparently little points

or not they will venture to seem over particular by mentioning such things. For instance:

An interpreter was sworn to interpret the testimony of one witness, and, in repeating the testimony, instead of speaking in the first



LIEUTENANT WARD.

which in one way or another are guarded, or should be raised in the course of a well-conducted trial, in order to ensure accuracy or to prevent misunderstanding. They can be disposed of without loss of time, and without argument, when both counsel and judge are experienced, and such disposition is a gain in clearness for all parties. But when the court is not familiar with the practice or the rules, counsel have to consider whether

person, as the witness did, he framed the answers in the third person, as "he says," etc. The translation may have been perfect, but this is a method which is not so good as rendering the answer as the witness gives it. In using the third person, the interpreter is apt to explain instead of giving what is directly characteristic of the witness. Such a method of interpreting tends to make the testimony less certainly that of the wit-

ness, both for the direct and the cross-examination.

### NAVAL PECULIARITIES.

Certain points arose, with reference especially to military practice. When the officer who took written despatches from Admiral Sampson to the applicant was testifying, conversation was excluded as distinguished from oral instructions. An interesting point in naval practice appeared when this witness said that he read the written order which he carried so that he might know it if he were obliged to destroy the despatch. He also said that he received oral instructions concerning his own actions, which did not appear in the written despatch.

The dangers of cipher transcripts, or translations of written despatches, were shown by a witness who testified to having found it necessary to abbreviate the sentences of a despatch because all the words were not in the code book.

An officer who had testified that he protested when Admiral Sampson sent a congratulatory despatch to the applicant, was asked by the applicant's counsel, "In protesting did you refer to the blockade of Cienfuegos?" The witness answered, "I had it partially in mind," and the answer was not objected to. As to the preliminary report of the applicant to the commander-in-chief, which was not sent, the court ruled that the applicant could refresh his memory by it, but could not read it aloud.

A witness whose testimony was interrupted by a recess was warned after the recess that his oath was still binding.

One of the terrors of persons who spend their lives in courts is the disposition of some witnesses to tell all that they know, and yet now and then a discreet witness may reasonably be asked such a question as that asked by Mr. Hanna, who showed the precept to a witness, and asked him to state anything of importance bearing on any of the points therein set forth.

As it is, the government arranges the assistance at its discretion. A lieutenant of the Navy who was present at the trial by order of the Navy Department, to assist, was permitted by the court, after inquiry as to propriety by counsel of the applicant, to join in the examination of a log while counsel were examining it before the court.

A difference between naval etiquette in marking distinctions of rank and the manners of civil courts appeared when the Judge Advocate spoke to a witness, who was a yeoman of one of the ships, by his last name, without any title, and Mr. Rayner on cross-examination addressed him as Mr.—.

Mr. Hanna politely expressed regret at having once spoken of the applicant as the accused. He probably used the word because the regulations use it concerning the person whose conduct is investigated by a court of inquiry. He said that the Judge Advocate and he had agreed upon the word "applicant" as the description to be used in this case.

### EXAMINING A MEMBER OF THE COURT AS TO HIS DISQUALIFICATION.

So many readers have not seen the record that a brief account of the preliminary proceedings may be of service to show not only the modern military practice, but also its liberality as well as dignity.

Rear-Admiral Schley wrote a letter, dated July 22, 1901, to the Secretary of the Navy, referring to "The History of the Navy," by Edgar Stanton Maclay; the first two volumes being text-books at the Naval Academy. The letter alleged that "perversion of facts, misconstruction of intention," and "intemperate abuse and defamation" are contained in the third volume of that work. The letter also referred to "innuendos of enemies" and expressed a wish that "this entire matter" be discussed, "under the clearer and calmer review of my brothers in arms," and to this end asks "such action at

the hands of the Department as it may deem best to accomplish this purpose."

An order by the Secretary of the Navy was issued to Admiral George S. Dewey appointing him president of a court of inquiry, and naming Rear-Admirals Lewis A. Kimberly and Andrew E. K. Benham as members thereof, and Captain Samuel C. Lemly, the Judge Advocate General, judge advocate, and ordering that such court convene at the Navy Department at Washington at 1 P.M., September 12, 1901, or as soon after as practicable, to inquire into the conduct of Rear-Admiral Winfield Scott Schley, Commodore during the recent war with Spain, and in connection with the events thereof. The order was, to inquire thoroughly into all the circumstances bearing upon the subject of the investigation; to have witnesses whose attendance could be secured; to call upon the Navy Department for all documentary evidence in relation thereto on its files, and to report its proceedings and the testimony taken, with a full and detailed statement of all the pertinent facts which it may deem to be established, together with its opinion and recommendation. The order states the report should show conclusions upon points for which it lays down specifications.<sup>1</sup> The order says that these specific directions are given, primarily, for the information and guidance of the court, but do not limit or restrict the scope of its inquiry into the "entire matter," the investigation of which is asked by the officer concerned.

Rear-Admiral Schley was said to have been informed of his right to be present either in person or by counsel, during the investigation, to cross-examine witnesses and to offer evidence. The court was given leave to grant at any time "to others interested and entitled thereto, like privileges." The investigation ordered was to be in open court. The order stated that this employment on shore duty was required by the public interests.

<sup>1</sup> See note at the end of this article.

Soon afterwards, Rear-Admiral Kimberly was relieved, and Rear-Admiral Henry L. Howison was appointed in his place. The first order to the court was modified by the order to hold the court at the Navy Yard in Washington, instead of the Navy Department.

On the 27th of July, Rear-Admiral Schley, by letter to the Secretary of the Navy, requested that Specification 5, which contained the word "disobedience," should "be modified so as to omit the department's expression of opinion and thus leave the court free to express its own opinion in that matter." On the 1st of August, the Assistant Secretary of the Navy replied by letter, saying that the precept treated certain matters as established; for instance, the arrival of the Flying Squadron off Cienfuegos and off Santiago, the retrograde movement, westward, the turn of the "Brooklyn," on July 3, 1898, and "the fact that you disobeyed orders as reported by you in your telegram dated Kingston, May 28, 1898, in which you say: 'Much to be regretted; cannot obey orders of the Department.'"<sup>2</sup> The letter added that the court was absolutely free to report that he was not wilfully disobedient, or that he was justified, and said that his letter and this reply would be forwarded to the court.

The Assistant Secretary of the Navy wrote to Captain Lemly, the Judge Advocate General, that Mr. Edwin P. Hanna, solicitor in the office of the Judge Advocate General, was associated with and "directed to assist you," and ordering the Judge Advocate General to communicate this appointment to the court, and to request that Mr. Hanna be afforded facilities for the discharge of his duties.

<sup>2</sup> This refers to the despatch as received by the Navy Department after having been put into cipher by the person whose business it was to translate. At the inquiry it appeared that this part of the despatch as found in Commodore Schley's letter-press copy book read as follows: "It is also regretted that the Department's orders can not be obeyed, earnestly as we have all striven to that end." Therefore the Judge Advocate in his argument relied upon the copy in the Commodore's copy book.

On the 12th of September, the court met in public session at the place appointed. The Judge Advocate General referred to article 1791, paragraph 2, of the Regulations for the Government of the Navy.

Instead of clearing the court room until the order and instructions had been read, the court withdrew for that purpose, and after having decided to sit with open doors returned and resumed its public session.

The Judge Advocate and his assistant had agreed, as subsequently appeared, to use the word "applicant" to describe Rear-Admiral Schley, although the Regulations use the words "the complainant" and "the accused."

Accordingly the Judge Advocate asked whether the applicant desired to be represented by counsel. The applicant replied, "Yes." The Judge Advocate asked: "By whom?" The applicant replied: "The Hon. Jeremiah M. Wilson, the Hon. Isidor Rayner, and Captain James Parker, U. S. N." Permission was granted, and the Judge Advocate introduced those gentlemen as counsel for the applicant.

The Judge Advocate then asked permission to introduce Mr. Hanna to assist the Judge Advocate. Permission was granted.

The Judge Advocate, having read the orders, asked whether there was any objection to any of the court. The applicant with express regret objected to Rear-Admiral Howison, on the ground that he had formed and expressed an opinion on the merits, and the applicant offered to present evidence of this. The following examination of Admiral Howison is especially interesting in view of the fact that in the case of General Howard<sup>1</sup> one of the members of the court itself, General Meigs, was a witness called by the government.

The Judge Advocate directed the applicant to proceed.

Therefore Mr. Rayner called a newspaper reporter as a witness, who said that he had heard Howison speak of Schley "in what I should call a sneering manner." Upon

cross-examination, Mr. Hanna asked the witness whether that was "an impression merely"; the witness replied, that it was an impression. The witness also testified to the words which Howison had spoken. Mr. Rayner then called as a witness a book publisher, and afterwards an editor of an encyclopedia of biography. The last witness expressed his unwillingness to testify. Rear-Admiral Howison said to him, "Do not let the sentimental part interfere in the least." The witness then stated that he had heard Howison, when looking at a picture of Schley, make comments upon Schley of an uncomplimentary nature, and suggest that Schley had been guilty of disobedience.

Upon the conclusion of this testimony the President of the Court asked Rear-Admiral Howison whether he had any questions to ask, to which he replied, "No." The Judge Advocate then said that he had no testimony to offer. Mr. Rayner then said to the court that the applicant challenged Rear-Admiral Howison for cause upon the contradicted testimony of three witnesses not impeached, and with no denial by Howison.

The Judge Advocate said that it had been arranged that Admiral Howison should make a statement after he had heard all that was to be said in support of the challenge.

Mr. Rayner said that that was not the practice in courts of inquiry or courts-martial; that the applicant and his counsel were entitled to hear Admiral Howison before argument, so that they could address the court, not on their own testimony merely, but on the whole testimony. He added that if Admiral Howison is to be examined, now is the time, and "we want to cross-examine."

The Judge Advocate replied that the practice is, after all has been said in challenge, for the member challenged to make "a statement as a member"; that he had not been called by the court as a witness, but is entitled, after all that is "urged" against him as a challenged member, to make such statement.

"Yes," said Judge Wilson, "but not after

<sup>1</sup> Court of Inquiry.

he has heard the arguments that may be made on that evidence."

Mr. Rayner compared the challenged member to a juror, and said that unless the statement were made now there would have to be a double argument.

The Judge Advocate said that the challenged member need not make a statement now; he may if he chooses; he may make none, or he may make one at any time before the final conclusion of the court is reached.

Mr. Rayner replied, "Then we reserve our argument."

The president said, "Admiral Howison will make his statement now. He will prepare it and submit it to the court."

Admiral Howison said that he would retire and prepare it and submit it. A recess was taken to give him the opportunity to do so.

Upon the reassembling of the court, the Judge Advocate read the statement of Admiral Howison. The statement makes answer to the testimony of the newspaper reporter; says that Howison does not remember the face of the book publisher, and that he had only a short talk with the editor; that he is here to obey orders; that he hopes that if any doubtful points appear, all such points will be decided in favor of Admiral Schley; that he has no personal feelings or wish, except for the good of the service. A copy of a letter of Admiral Howison to the Assistant Secretary of the Navy was annexed to his statement. The letter said that he was ready to withdraw voluntarily or to have the Department relieve him; or if the Department, knowing all the circumstances, wished, he was ready to do his duty, "without partiality," as the law required.

Mr. Rayner said that the applicant's counsel wished to ask a few questions of Admiral Howison. The Judge Advocate repeats this to the court, and it is permitted. Admiral Howison said that he did not propose to go into private discussions.

Mr. Rayner said to him that the question was whether he had made up his mind that Admiral Sampson should have the credit of the battle of Santiago. Admiral Howison replied, "May be I have," and went on to explain that perhaps he had made up his mind that if Sampson was commander-in-chief he was entitled to such credit, and added, "I am merely talking now of the Navy Orders and Regulations, and the customs and commands of the service."

To further questions by Mr. Rayner, Admiral Howison said that he did not recollect that what the witnesses had testified to had happened, and did not even remember all the witnesses, but that if some one should say that an officer had done this or that thing, he would not hesitate to say to any one that such officer would be subject to a court-martial, if that were so, under the navy regulations; and that it was natural to speak so when addressed by a stranger on the subject.

Mr. Rayner then said, "Are you willing to ask the court to relieve you?"

Admiral Howison replied, "I can't. They must do it on the merits."

Then followed this interesting dialogue:

Mr. Rayner said, "If the question of who was commander-in-chief is involved, and you think that Admiral Sampson was, have you not made up your mind on a very important question?"

Admiral Howison answered, "No."

Mr. Rayner: "Why not?"

Admiral Howison said, "I don't care what a naval officer has been talking in private. . . . Naval officers are taught from youth up that their oath of office is something different from most people's oaths," and he added, "an officer may judge from the testimony without regard to what he may have taken from newspaper reports."

Mr. Rayner said, "But you put on us the burden of proof that your opinion was wrong."

Here came what lawyers would expect,



the usual begging of the question by an honest person unaccustomed to such examination and especially by a person accustomed to command. Admiral Howison answered that, if a man is commander-in-chief, somebody must prove that he is not. Then followed some discussion, in which the Judge Advocate said, "I assisted in preparing the specifications."

Mr. Rayner: "We did not," and remarked upon a comparison between the conduct of Schley and Sampson. The Judge Advocate said that it was not a question of comparison.

Mr. Rayner then said, "We intend to prove that Admiral Sampson was not at the battle of Santiago at all," and added that "It becomes a question who was the commander-in-chief. . . . If Admiral Howison has expressed an opinion, we have the burden of proving innocence."

Mr. Rayner then asked Admiral Howison whether he had not, to one of the three witnesses, or to any one else, expressed an opinion as to Admiral Sampson's having commanded at Santiago and deserving the credit for the victory.

Admiral Howison replied, "It is generally understood" that Admiral Sampson was, and added "I have not seen the official reports. I have not made up my mind, because I do not know the circumstances."

During the argument which followed, Mr. Rayner was saying that, according to one of the witnesses, Admiral Howison had spoken of coaling at sea and of disobedience, when Admiral Howison interrupted Mr. Rayner, and said, "I do not like positively to deny the words of these gentlemen that came here. They are not exactly under oath, neither am I. They should be believed just as much as myself. I do not like to be so positive;" then he added that the witness quoted "must be mistaken as to coaling." Mr. Rayner replied, "I am perfectly willing to believe every word you say," and added that the objection was entirely on the basis of Admiral

Howison's own statement. Mr. Rayner then made his argument, and compared the challenged member to a challenged juror who has an opinion which requires evidence to remove it, and said it was safer to exclude him.

The Judge Advocate then advised the court that it was in order for the unchallenged members to withdraw. Accordingly, a recess was ordered.

Upon the reassembling of the court, the president stated that the objection to Rear-Admiral Howison as a member of the court was sustained, and that he was therefore excused.

The court was then adjourned without day, to await the action of "the convening authority," and the president of the court wrote to the Secretary of the Navy informing him of the objection, and of its having been sustained, and of the adjournment subject to instructions.

It is worth noting here that at the court-martial of Captain David Porter<sup>1</sup> of the United States Navy, he challenged the Judge Advocate as biased, and so unfit to act as such officer. The court asked the advice of the Judge Advocate himself upon the point. The Judge Advocate replied, the accused has no right to except to the Judge Advocate, and the court has no right to decide on any exception to the Judge Advocate. No precedent has been of such a thing. The court opened and announced its denial of Captain Porter's challenge. The Judge Advocate then proceeded and tried the case.

Some readers will probably agree with the following remarks of the late author, J. Fenimore Cooper, concerning certain supposed prejudice on the part of members of the court-martial which tried Captain Mackenzie, but the present writer thinks the view mistaken. Mr. Cooper wrote: "This is one of the evils which result from the encroachments of the press, which will soon overshadow all that is left of justice in the coun-

<sup>1</sup> Court-Martial, 7 July, 1825.

try, unless checked. The record of no court of inquiry ought to be published until the case is finally disposed of, nor, as we think, the evidence in any trial. Nothing is gained by it but catering to a vicious taste or morbid curiosity, while much may be lost to the rightful administration of justice."<sup>1</sup>

A taste for understanding how solemn acts of government are done is not vicious, and the surest way to gratify it is at the moment when it is being done. Curiosity as to how we are governed is not morbid. If there is any tendency which would increase vice and morbidity, it is a want of such taste and such a curiosity. The press, newspapers included, with all its faults, increases the influence of both civil and military courts, and while doing much injustice does more good than harm to the administration of justice.

On the 20th of September the court again assembled, Rear-Admiral Francis M. Ramsay being present:

The Judge Advocate read a letter of 13th of September, from the Assistant Secretary of the Navy, appointing Rear-Admiral Ramsay in place of Howison relieved.

The Judge Advocate inquired of the applicant whether there was any objection; to which the applicant replied, "None."

The president and the other members of the court were then sworn by the Judge Advocate, and he was sworn by the president in the presence of the applicant.

Several persons were sworn as stenographers.

The Judge Advocate read a letter from the president of the court to the Secretary of the Navy, requesting that the court be furnished with all the documentary evidence on the files of the Department relating to the matter under inquiry, and the reply stating compliance and offering attention if further documents should be required.

<sup>1</sup> Review of the Proceedings of the Naval Court Martial in the case of Alexander Slidell Mackenzie, a Commander in the Navy of the United States. By James Fenimore Cooper. (New York, 1844.)

<sup>2</sup> U. S. N. *Reg.*, 1792.

The Judge Advocate advised the court that it was in order for the court to withdraw to discuss its order of procedure. The court withdrew.

Upon reassembling, the Judge Advocate asked whether the applicant had anything to offer as to the method of conducting the inquiry, whether the applicant would begin or the Judge Advocate should begin. Judge Wilson said, "Go right along, Mr. Judge Advocate."

Whereupon, the Judge Advocate proceeded to put in his case.

#### RULINGS AND ARGUMENTS.

The most of the rulings were upon points of practice, as might be expected in a court appointed for a single case only. The most of the discussions concerning what rulings should be given were about the admissibility of opinions. About an equal number of points were raised, by one side or the other, concerning hearsay. The rulings which limited the scope of the reports of the court, and thus affected the nature of the inquiry more than any other rulings, were those which excluded questions intended to raise comparisons between the conduct of Admiral Schley and Admiral Sampson, as to the blockade; and as to neither having tried to destroy the "Colon," when she was lying at the mouth of the harbor; and as to facts leading to the question of command at the battle of Santiago. But one of the peculiarities of the case is that the applicant's counsel postponed and finally omitted debate which would have required an expressly clear ruling as to whether command was or was not in issue. They took the risk of the possible uncertainty of arbitrary rulings on evidence. This policy may have helped them to divide the court.

The arguments of the counsel for the applicant mean substantially, in brief, that during the entire time under examination he had much discretion, which he used reasonably,

and that, upon the whole, he obeyed orders, and that if he was ever disobedient, it was for justifiable cause. The arguments of the Judge Advocate and the Solicitor, his assistant, mean, substantially, that whether he obeyed orders or not, he did not do his utmost to find, burn, sink or destroy the enemy, and that much of his conduct was unjustifiable disobedience of orders upon points essential to any success in the campaign.

The judicial clearness and brevity of the opening argument by Mr. Hanna, made after the evidence was in, and the argumentative force of his statement of facts, is of great assistance in looking back at the complicated masses of testimony and documents. A comprehensive grasp of details and a sober discussion of the points made for the applicant characterized the final argument of Captain Lemly, the Judge Advocate, who won confidence in the spirit of his prosecution of the inquiry when he said, "From my knowledge of the man, having served under his command on two cruises, I have never believed, nor do I claim from the evidence, that personal misconduct,—or, to call a spade a spade, cowardice—was exhibited by Commodore Schley in any part of his career as commander-in-chief of the 'Flying Squadron.'"

No man can be always lucky, and the luck which had previously attended Admiral Schley was not with his cause when the sudden death of Judge Wilson, in the midst of the inquiry, deprived him of his wary senior counsel. Great professional consideration is due to the able associates who had to go on, contrary to their original plans. The aggressive tactics of the remaining senior counsel for the applicant in the course of the trial has been criticised as not adapted to affect the judgment of the members of the court, but the worth of counsel is to be weighed by the strongest and not by the weakest points which they make, whether in matter or manner, and it was in telling cross-examination, and in his final spirited argu-

ment, that the value of Mr. Rayner's able advocacy was proved. He and Captain Parker, who added naval to legal experience, succeeded in dividing the court upon points involving the tone of its report, and in a court of inquiry this goes a great way, especially as it shall affect the future judgment of students not stirred by the antagonism of present parties. The division of the court and the review of the President of the United States on the appeal prove that vituperation, even when patriotic, has signally failed as against either side.

Since the printed record contains about sixteen hundred pages of testimony, it may be convenient for readers to know that appended to Mr. Rayner's argument, and arranged under the several specifications, are brief minutes of testimony written by Mr. M. A. Teague, of Baltimore, to whom Mr. Rayner gave the credit of this laborious work. With Mr. Hanna's statement for the government and these minutes for the applicant, one is helped to find and to appreciate the evidence relied upon on each side.

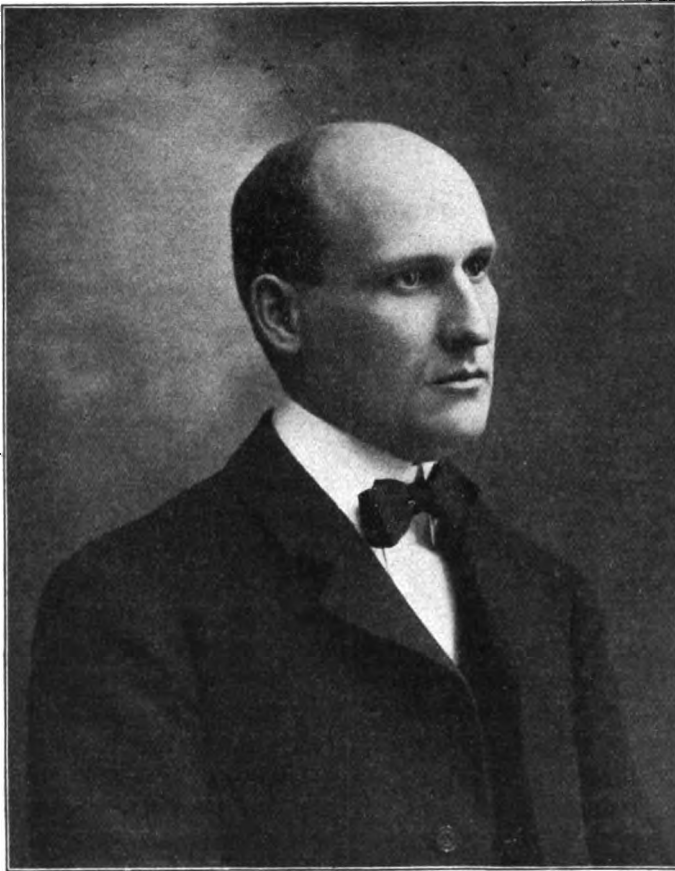
### CHARACTERISTIC POWERS.

The chief trait distinguishing the methods of examination in courts of inquiry from those of civil courts is the court's control. In civil courts the rules of exclusion, which give the parties to the cause the right to have hearsay opinions, matters concerning others, and evidence of character ruled out, when offered, subject the court to be overruled by a superior or an appellate court, if it admits or rejects evidence illegally. Hence, each party can plan beforehand with some degree of approximate correctness as to how its own evidence will be treated, either by the original or the final court. But no man can tell what a court of inquiry may admit or exclude, or what some member of it may permit himself to think about, and even to report about, even if excluded.

This renders a court of inquiry a source

of more varied information about a general situation or a particular fact than a civil court. It prevents either party from controlling the opinion of the court by not offering evidence which might damage such party, and it enables the court to contribute

when soldiers wish to be sure that they are right, before they go ahead, they stop to take lessons of men whose professional business it is to examine and cross-examine without fear or favor, to argue to a definite point, without anxiety lest the world will lose truth



MERRILL A. TEAGUE, ESQ.

a broad view of its own as distinguished from a narrow finding within more or less technical limits.

Thus a court of inquiry is fundamentally a military and not a civil institution. Its practice, however, of trying to make some use of legal principles as distinguished from legal rules of evidence is a professional tribute by the army and navy to the value of the thought and experience of lawyers. Even

because one cannot talk on both sides at once, to control deliberation to evidence known by both sides to be in the case, and to give value to decision by confining it to what was examined and argued.

In this case when the court had all the advantages of both legal and military assistance, where the witnesses were almost all experts of one kind or another, where the court was not bound by rules of exclusion

or of admission of parties or of testimony, except so far as their discretion limited them under the order for the inquiry, there were nevertheless difficulties similar to those which are complained of in our civil courts. Some difficulties were overcome, as they are in civil courts, by reasonable agreements of counsel, but the authority of the court to decide more freely than any civil court can, by no means eliminated the rest of the difficulties. The very power of the court raised difficulties of its own, for instance, as to the exclusion of Admiral Sampson as a party, and as to questions of evidence bearing on his relations to the matter. Thus difficulties arising in the practice of civil courts which have to be met by principles of common law and equity, arise also in military courts, which are granted power in order to avoid such difficulties. Then, by the very exercise of such power, the military courts create difficulties which, in their turn, have to be overcome by the exercise of some superior power; thus, sooner or later, the action of both civil and military courts has to be subjected to the decision of some power which can bring a case to an end, not because any one is satisfied, but because it is one of the functions of that power to end cases when it is not obliged by some law or principle or necessity to keep it pending. This power to conclude trials is one of the essential necessities of any government.

#### THE VALUE OF THE CASE.

The chief importance of this case, for the military service, may be in the findings of fact and the opinion of what the decision of the Secretary of the Navy describes as "the full court" and in his approval of such findings and such opinion, and in the mingled approval and criticism of the opinions of the members of the court collectively and severally by the President of the United States in his review of the entire matter on the appeal. The value of the case as a precedent for

military courts is the decision that "propriety" requires them not to make a finding of fact or to render an opinion upon a question on which evidence is excluded by them. Thus the action of the presiding member of the court, by carrying his exercise of the discretion of a military judge to an extreme, has given occasion for a decision of the Navy Department which at once strengthens the position of Judge Advocates throughout the service by adding a legal principle to clarify the obscure standard of fairness for military judges. This decision also improves the relations of legal counsel of an applicant towards the Judge Advocate, and the members of the court, by opening to them definitely an opportunity to argue upon the final limits to be put to the report in consequence of excluding one who is offered in any way as a party. The memorandum of the President of the United States on the appeal both warns and protects dissenting members of a court of inquiry.

After the storm of professional jealousies and ferocious political passions of which it has been a centre shall have subsided, and the history of this inquiry shall have been written by competent and impartial students of its record, the case will stand as a leading precedent of thorough work. All sides labored under circumstances of great difficulty. Each is said to have been attacked by secret as well as open enemies, some of them in power, and many of them influential. Naturally the stress of personal feeling which was inevitable, led the advocates of each side and the members of the court to be as careful as they were outspoken.

Whether the reader was interested in the play of organized forces, or in the fortunes of individuals, his imagination found there a solemn scene. No case can be conceived in which the clear-mindedness and skill required by the legal profession were more needed to prevent, by reciprocal objections, waste of energy in scandalous quarrels; to

find out what issues the court would consider and to hold the examination down to the necessary facts controlling such issues.

As usual it was heard here and there that the public would have less confidence in either side because of its presentation by legal advocates. But without such critical assistance the case threatened to involve the history of the modern and of the ancient world. The confidence of the public, while often withheld from the views of advocates on either side of any controversy, is apt to be given quite freely to the judgment of a court informed and warned, if not guided, by such advocacy. That is the honest purpose as well as the useful result of our legal practice which the regulations of the Navy treat with a respect proved by imitation so far as the exigencies of military service permit.

#### THE LEGAL RESULTS.

The ability with which the inquiry was conducted on both sides was a worthy preparation for the mastery of the case after the appeal by the President of the United States whose learning as a military critic<sup>1</sup> and whose experience as a soldier enabled him to rise above the necessary function, even of his great office, and to lay down the military law, besides treating war as a business in deciding upon the facts.

The legal results of the inquiry are that Rear-Admiral Schley has been expressly protected against the personal abuse which caused his application for the inquiry; that the court has exercised its discretion by refusing to hear an Admiral who claimed to be interested, and by excluding even so fundamental a question as command from its opinion in a case where it excluded evidence offered upon the point, although some evidence concerning command was given inci-

<sup>1</sup> See "The Naval War of 1812," by Theodore Roosevelt, published in 1882 and 1900; also his chapter on that war in "The Royal Navy" above referred to.

dentally; that the propriety of dissent upon issues tried has been respected by both the Secretary of the Navy and the President of the United States; that the power of any member of a court of inquiry to express views even without strict propriety if within the precept, although not approved, has not been disputed by the Secretary of the Navy, and has been respectfully recognized by the President of the United States; that the appeal from an inquiry in open session has resulted in a private inquiry by the Commander-in-Chief, who admitted and excluded witnesses and advisers as he chose: that he has examined on appeal the question of command and credit which the dissenting member of the court of inquiry raised by an inartificial finding in his separate opinion instead of by a recommendation for further inquiry; and that the President, as Commander-in-Chief, has rendered a decision upon the whole case excluding and including details at discretion as he deemed best, and has thus exemplified in a striking manner the difference between the powers and the methods of civil and of military judges.<sup>2</sup>

<sup>2</sup> This is not a discussion of courts-martial, but some old soldiers and sailors may remember in their own experience, in the rush of the Civil War, instances like the following: In 1864, a General Court-Martial, of which Major Henry P. Bowditch of the Fifth Massachusetts Cavalry was president, tried an officer upon a charge made by his superior officer. The court found the accused guilty, but also found that his conduct was not criminal. Hence the court added that "The court . . . do therefore acquit him." The court explained these findings by stating the conduct of the officer who had made the accusation which the court characterized "as conduct unbecoming an officer and a gentleman." General Orders, No. 91, Headquarters Department of Washington, 22nd Army Corps, September 29, 1864. This is said to have been read aloud to the regiment to which the accuser and accused belonged, and to have been approved by the general in command.

Of the freedom of courts of inquiry Winthrop says: "Some of the most conspicuous instances . . . have been cases in which a . . . court-martial was . . . barred by the . . . statutory period, and a court of inquiry remained the only means by which the facts could be satisfactorily investigated, or the person vindicated or the reverse. . . . In the cases of General Dyer and General Howard the charges and transactions dated back beyond the period of the statutory limitation." (Ch. 24.)

## NOTES.

## EXTRACT FROM THE PRECEPT.

The precept contained the following specifications for inquiry concerning Commodore Schley:

"(1). His conduct in connection with the events of the Santiago campaign.

"(2) The circumstances attending, the reasons controlling, and the propriety of the movements of the 'Flying Squadron' off Cienfuegos in May, 1898.

"(3). The circumstances attending, the reasons controlling, and the propriety of the movements of the said squadron in proceeding from Cienfuegos to Santiago.

"(4). The circumstances attending the arrival of the 'Flying Squadron' off Santiago, the reasons for its retrograde turn westward, and departure from off Santiago, and the propriety thereof.

"(5). The circumstances attending and the reasons for the disobedience by Commodore Schley of the orders of the department contained in its dispatch dated May 25, 1898, and the propriety of his conduct in the premises.

"(6). The condition of the coal supply of the 'Flying Squadron,' on and about May 27, 1898; its coaling facilities; the necessity, if any, for, or advisability of, the return of the squadron to Key West to coal; and the accuracy and propriety of the official reports made by Commodore Schley with respect to this matter.

"(7). Whether or not every effort incumbent upon the commanding officer of a fleet under such circumstances was made to capture or destroy the Spanish cruiser 'Colon' as she lay at anchor in the entrance to Santiago harbor, May 27 to 31, inclusive, and the necessity for, or advisability of, engaging the batteries at the entrance to Santiago harbor, and the Spanish vessels at anchor within the entrance to said harbor, at the ranges used, and the propriety of Commodore Schley's conduct in the premises.

"(8). The necessity, if any, for, and advisability of, withdrawing at night the 'Flying Squadron' from the entrance to Santiago harbor to a distance at sea, if such shall be found to have been the case; the extent and character of such withdrawal; and whether or not a close or adequate blockade of said harbor, to prevent the escape of the enemy's vessels therefrom, was established, and the propriety of Commodore Schley's conduct in the premises.

"(9). The position of the 'Brooklyn' on the morning of July 3, 1898, at the time of the exit of the Spanish vessels from the harbor of Santiago, the circumstances attending, the reasons for, and the incidents resulting from the turning of the 'Brooklyn' in the direction in which she turned at or about the beginning of the action with said Spanish vessels, and the possibility of thereby colliding with or endangering any other of the vessels of the United States fleet, and the propriety of Commodore Schley's conduct in the premises.

"(10). The circumstances leading to, and the incidents and results of, a controversy with Lieut. Albon C. Hodgson, U. S. Navy, who, on July 3, 1898, during the battle of Santiago, was navigator of the 'Brooklyn,' in relation to the turning of the 'Brooklyn'; also the colloquy at that time between Commodore Schley and Lieut. Hodgson, and the ensuing correspondence between them on the subject thereof and the propriety of the conduct of Admiral Schley in the premises."

The precept also says that:

"The foregoing specific directions are given primarily for the information and guidance of the Court, but do

not limit or restrict the scope of its inquiry into the 'entire matter,' the investigation of which is asked by the officer concerned.

"Rear-Admiral Schley has been informed of his right to be present, either in person or by counsel, during the investigation, to cross-examine witnesses and to offer evidence before the Court, should he so desire. The Court may at any time grant to others interested and entitled thereto like privileges.

"The investigation will be held in open court."

There is not space to reprint the Court's report of the facts. Their opinions and the decision of the Secretary of the Navy and the decision of the President of the United States contained in his Memorandum on the appeal are here given.

## THE OPINION OF THE COURT.

Commodore Schley, in command of the Flying Squadron, should have proceeded with utmost dispatch off Cienfuegos, and should have maintained a close blockade of that port.

He should have endeavored on May 23, at Cienfuegos, to obtain information regarding the Spanish squadron by communicating with the insurgents at the place designated in the memorandum delivered to him at 8.15 A.M. of that date.

He should have proceeded from Cienfuegos to Santiago de Cuba with all dispatch and, should have disposed his vessels with a view of intercepting the enemy in any attempt to pass the Flying Squadron.

He should not have delayed the squadron for the Eagle.

He should not have made the retrograde turn westward with his squadron.

He should have promptly obeyed the Navy Department's order of May 25.

He should have endeavored to capture or destroy the Spanish vessels at anchor near the entrance of Santiago Harbor on May 29 and 30.

He did not do his utmost with the force under his command to capture or destroy the "Colon" and other vessels of the enemy which he attacked on May 31.

By commencing the engagement on July 3 with the port battery, and turning the "Brooklyn" around with port helm, Commodore Schley caused her to lose distance and position with the Spanish vessels, especially with the "Vizcaya" and "Colon."

The turn of the "Brooklyn" to starboard was made to avoid getting her into dangerous proximity to the Spanish vessels. The turn was made toward the "Texas," and caused that vessel to stop and to back her engines to avoid possible collision.

Admiral Schley did injustice to Lieutenant Commander A. C. Hodgson in publishing only a portion of the correspondence which passed between them.

Commodore Schley's conduct in connection with the events of the Santiago campaign prior to June 1, 1898, was characterized by vacillation, dilatoriness and lack of enterprise.

His official reports regarding the coal supply and the coaling facilities of the Flying Squadron were inaccurate and misleading.

His conduct during the battle of July 3 was self-possessed, and he encouraged, in his own person, his subordinate officers and men to fight courageously.

**THE DISSENTING OPINION.**

In the opinion of the undersigned, the passage from Key West to Cienfuegos was made by the Flying Squadron with all possible dispatch, Commodore Schley having in view the importance of arriving off Cienfuegos with as much coal as possible in the ships' bunkers.

The blockade of Cienfuegos was effective.

Commodore Schley, in permitting the steamer "Adula" to enter the port of Cienfuegos, expected to obtain information concerning the Spanish squadron from her when she came out.

The passage from Cienfuegos to a point about twenty-two miles south of Santiago was made with as much dispatch as was possible while keeping the squadron a unit.

The blockade of Santiago was effective.

Commodore Schley was the senior officer of our squadron off Santiago when the Spanish squadron attempted to escape on the morning of July 3, 1898. He was in absolute command, and is entitled to the credit due to such commanding officer for the glorious victory which resulted in the total destruction of the Spanish ships.

GEORGE DEWEY,

*Admiral, U. S. N.*

SAM. C. LEMLY,

*Judge Advocate General, U. S. N., Judge Advocate.*

**RECOMMENDATION.**

In view of the length of time which has elapsed since the occurrence of the events of the Santiago campaign, the court recommends no further proceedings be had in the premises.

GEORGE DEWEY,

*Admiral, U. S. N., President.*

SAM. C. LEMLY,

*Judge Advocate General, U. S. N., Judge Advocate.*

**THE DECISION OF THE SECRETARY OF THE NAVY.**

The department has read the testimony in this case, the arguments of counsel at the trial, the court's findings of fact, opinion and recommendation, the individual memorandum of the presiding member, the statement of exceptions to the said findings and opinion by the applicant; the reply to said statement by the judge advocate of the court and his assistant, and the brief this day submitted by counsel for Rear-Admiral Sampson traversing the presiding member's view as to who was in command at the battle of Santiago.

And, after careful consideration, the findings of fact and the opinion of the full court are approved.

As to the point on which the presiding member differs from the opinion of the majority of the court, the opinion of the majority is approved.

As to the further expression of his views by the same member with regard to the questions of command on the morning of July 3, 1898, and of the title to credit for the ensuing victory, the conduct of the court in making no finding and rendering no opinion on those questions is approved — indeed, it could with propriety take no other course, evidence on these questions during the inquiry having been excluded by the court.

The department approves of the recommendation of the court that no further proceedings be had in the premises.

The department records its appreciation of the arduous labors of the whole court.

JOHN D. LONG,

*Secretary of the Navy.*

**THE MEMORANDUM OF THE PRESIDENT OF THE UNITED STATES UPON THE APPEAL.**

WHITE HOUSE, February 18, 1902.

I have received the appeal of Admiral Schley and the answer thereto from the Navy Department. I have ex-

amined both with the utmost care, as well as the preceding appeal to the Secretary of the Navy. I have read through all the testimony taken before the Court and the statements of the counsel for Admirals Sampson and Schley; have examined all the official reports of every kind in reference to the Santiago naval campaign, copies of the logbooks and signal books, and the testimony before the Court of Claims, and have also personally had before me the four surviving captains of the five ships, aside from those of the two admirals, which were actively engaged at Santiago.

It appears that the Court of Inquiry was unanimous in its findings of fact and unanimous in its expressions of opinion on most of its findings of fact. No appeal is made to me from the verdict of the Court on these points where it was unanimous. I have, however, gone carefully over the evidence on these points also. I am satisfied that on the whole the Court did substantial justice. It should have specifically condemned the failure to enforce an efficient night blockade at Santiago while Admiral Schley was in command. On the other hand, I feel that there is a reasonable doubt whether he did not move his squadron with sufficient expedition from port to port. The Court is a unit in condemning Admiral Schley's action on the point where it seems to me he most gravely erred; his "retrograde movement" when he abandoned the blockade, and his disobedience of orders and misstatement of facts in relation thereto. It should be remembered, however, that the majority of these actions which the Court censures occurred five weeks or more before the fight itself; and it certainly seems that if Admiral Schley's actions were censurable he should not have been left as second in command under Admiral Sampson. His offenses were in effect condoned when he was not called to account for them. Admiral Sampson, after the fight, in an official letter to the Department alluded for the first time to Admiral Schley's "reprehensible conduct" six weeks previously. If Admiral Schley was guilty of reprehensible conduct of a kind which called for such notice from Admiral Sampson, then Admiral Sampson ought not to have left him as senior officer of the blockading squadron on the 3d of July, when he (Sampson) steamed away on his proper errand of communication with General Shafter.

We can therefore for our present purposes dismiss consideration of so much of the appeal as relates to anything except the battle. As regards this, the point raised in the appeal is between Admiral Sampson and Admiral Schley, as to which was in command, and as to which was entitled to the credit, if either of them was really entitled to any unusual and preëminent credit by any special exhibition of genius, skill and courage. The Court could have considered both of these questions, but as a matter of fact it unanimously excluded evidence offered upon them, and through its president announced its refusal to hear Admiral Sampson's side at all; and in view of such exclusion the majority of the Court acted with entire propriety in not expressing any opinion on these points. The matter has, however, been raised by the President of the Court. Moreover, it is the point upon which Admiral Schley in his appeal lays most stress, and which he especially asks me to consider. I have therefore carefully investigated this matter also, and have informed myself upon it from the best sources of information at my command.

The appeal of Admiral Schley to me is not, as to this, the chief point he raises, really an appeal from the decision of the Court of Inquiry. Five-sixths of the appeal is devoted to this question of command and credit; that is, to matter which the Court of Inquiry did not consider. It is in effect an appeal from the action of President



McKinley three years ago when he sent in the recommendations for promotion for the various officers connected with the Santiago squadron, basing these recommendations upon his estimate of the credit to which the officers were respectively entitled. What I have to decide, therefore, is whether or not President McKinley did injustice in the matter. This necessarily involves a comparison of the actions of the different commanders engaged. The exhaustive official reports of the action leave little to be brought out anew; but as the question of Admiral Sampson's right to be considered in chief command, which was determined in his favor by President McKinley, and later by the Court of Claims, has never hitherto been officially raised, I deemed it best to secure statements of the commanders of the five ships (other than the "Brooklyn" and "New York," the flagships of the two admirals) which were actively engaged in the fight. Admiral Philip is dead. I quote extracts from his magazine article on the fight, written immediately after it occurred; closing with an extract from his letter to the Secretary of the Navy of February 27, 1899.

[Here follows a recital of statements by the said commanders.]

These are the facts as set forth above in the statements of the captains, and elsewhere in their official reports and testimony. They leave no room for doubt on any important point.

The question of command is in this case nominal and technical. Admiral Sampson's ship, the "New York," was seen at the outset of the fight from all the other ships except the "Brooklyn." Four of these five ship captains have testified that they regarded him as present and in command. He signaled "Close in" to the fleet as soon as the first Spanish ship appeared, but his signal was not seen by any American vessel. He was actually under fire from the forts, and himself fired a couple of shots, at the close of the action with the torpedo boats, in addition to signaling the "Indiana" just at the close of the action. But during the action not a single order from him was received by any of the ships that were actively engaged.

Admiral Schley at the outset of the action hoisted the two signals of "Clear ship" and "Close in," which was simply carrying out the standing orders of Admiral Sampson as to what should be done if the enemy's ships attempted to break out of the harbor. Until after the close of the first portion of the fight at the mouth of the harbor, and until after he had made his loop and the Spanish ships were fleeing to the westward, not another American ship noticed a signal from him. When the western pursuit had begun, the "Oregon," and the "Oregon" only, noticed and repeated one of his signals of command. The captain of the "Oregon" then regarded him as in command, but did not in any shape or way execute any movement or any action of any kind whatsoever in accordance with any order from him.

In short, the question as to which of the two men, Admiral Sampson or Admiral Schley, was at the time in command, is of merely nominal character. Technically Sampson commanded the fleet, and Schley, as usual, the western division. The actual fact, the important fact, is that after the battle was joined not a helm was shifted, not a gun was fired, not a pound of steam was put on in the engine room aboard any ship actively engaged, in obedience to the order of either Sampson or Schley, save on their own two vessels. It was a captain's fight.

Therefore the credit to which each of the two is entitled rests on matters apart from the claim of nominal command over the squadron; for so far as the actual fight was concerned neither one nor the other in fact exercised any command. Sampson was hardly more than

technically in the fight. His real claim for credit rests upon his work as Commander-in-Chief; upon the excellence of the blockade; upon the preparedness of the squadron; upon the arrangement of the ships head on in a semicircle around the harbor; and the standing orders in accordance with which they instantly moved to the attack of the Spaniards when the latter appeared. For all these things the credit is his.

Admiral Schley is rightly entitled—as is Captain Cook—to the credit of what the "Brooklyn" did in the fight. On the whole she did well; but I agree with the unanimous finding of the three admirals who composed the Court of Inquiry as to the "loop." It seriously marred the "Brooklyn's" otherwise excellent record, being in fact the one grave mistake made by any American ship that day. Had the "Brooklyn" turned to the westward, that is, in the same direction that the Spanish ships were going, instead of in the contrary direction, she would undoubtedly have been in more "dangerous proximity" to them. But it would have been more dangerous for them as well as for her! This kind of danger must not be too nicely weighed by those whose trade it is to dare greatly for the honor of the flag. Moreover, the danger was certainly not as great as that which, in the selfsame moment, menaced Wainwright's fragile craft as he drove forward against the foe. It was not in my judgment as great as the danger to which the "Texas" was exposed by the turn as actually made. It certainly caused both the "Brooklyn" and the "Texas" materially to lose position compared to the fleeing Spanish vessels. But after the loop had once been taken Admiral Schley handled the "Brooklyn" manfully and well. She and the "Oregon" were thenceforth the headmost of the American vessels—though the "Iowa" certainly, and seemingly the "Texas" also, did as much in hammering to a standstill the "Viscaya," "Oquendo," and "Teresa"; while the "Indiana" did all her eastward position and crippled machinery permitted. In the chase of the "Colon" the "Brooklyn" and "Oregon" share the credit between them.

Under such circumstances it seems to me that the recommendations of President McKinley were eminently proper, and that so far as Admirals Sampson and Schley were concerned it would have been unjust for him to have made other recommendations. Personally I feel that in view of Captain Clark's long voyage in the "Oregon" and the condition in which he brought her to the scene of service, as well as the way in which he actually managed her before and during the fight, it would have been well to have given him the same advancement that was given Wainwright. But waiving this, it is evident that Wainwright was entitled to receive more than any of the other commanders; and that it was just to Admiral Sampson that he should receive a greater advance in numbers than Admiral Schley—there was nothing done in the battle that warranted any unusual reward for either. In short, as regards Admirals Sampson and Schley, I find that President McKinley did substantial justice, and that there would be no warrant for reversing his action.

Both Admiral Sampson and Admiral Schley are now on the retired list. In concluding their report the members of the Court of Inquiry, Admirals Dewey, Benham, and Ramsay, unite in stating that they recommend that no further action be had in the matter. With this recommendation I most heartily concur. There is no excuse whatever from either side for any further agitation of this unhappy controversy. To keep it alive would merely do damage to the Navy and to the country.

THEODORE ROOSEVELT.

# The Green Bag.

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor,  
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

*The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.*

UNDER ordinary circumstances we should think something like an apology was due to our readers for laying before them a GREEN BAG containing but a single article. But where, as in the present instance, a subject of national interest and importance is at hand, and when the author, as in Mr. Grinnell's case, brings to his task both legal learning and rare literary skill, it would seem that, at most, an explanation is all that we are called upon to make. The fact is, that under Mr. Grinnell's exhaustive study of courts of inquiry the subject grew and assumed such importance that it seemed impossible to treat it adequately in an article of ordinary length; nor did it seem advisable to print the article in instalments. The present issue, therefore, has been given over wholly to this review, from a legal standpoint, of the Schley court of inquiry and of the military courts; and we feel confident both that the article will prove interesting and instructive to the readers of THE GREEN BAG, and that it will be recognized as a valuable contribution to legal literature.

By the death of Professor James Bradley Thayer, of the Harvard Law School, the American Bar loses one of its most distinguished members. Born in 1831, Professor Thayer graduated from Harvard in 1852, and from the Law School four years later. The same year he was admitted to the bar, and continued in active practice in Boston until his appointment, in 1873, to the Royall Professorship of Law in the Harvard Law School. Ten years later he was appointed to the professorship which has been known, since 1893, as the Weld Professorship. His death makes the first break, if we except the retirement of Professor Langdell from active work, in the remarkable group of

teachers of the older generation who have done so much to make the Harvard Law School world-famous and to advance the cause of legal education.

Professor Thayer's contributions to legal literature and his miscellaneous writings were many and important; and it is a matter of regret that his great work on Evidence remains unfinished. In a recent review of his "John Marshall" we spoke of "the excellent and cultured style, the charming modesty, the deep learning and vigorous thinking which mark all that Professor Thayer writes," — these were, indeed, the qualities of his work.

## NOTES.

EX-GOVERNOR LESLIE M. SHAW of Iowa, the new Secretary of the Treasury, practiced law for many years in the Iowa courts. The Secretary is a good story-teller and narrates this personal experience of the days when he was practicing at the bar.

A boy about fourteen had been put on the stand, and the opposing counsel was examining him. After the usual preliminary questions as to the witness's age, residence and the like, he then proceeded:

"Have you any occupation?"

"No."

"Don't you do any work of any kind?"

"No."

"Just loaf around home?"

"That's about all."

"What does your father do?"

"Nothin' much."

"Doesn't he do anything to support the family?"

"He does odd jobs once in a while when he can get them."

"As a matter of fact, isn't your father a pretty worthless fellow, a deadbeat and a loafer?"

"I don't know, sir; you'd better ask him. He's sitting over there on the jury."

The Bench deprecates long arguments, and hence admires most your men of few words. Timothy Coffin, once, in rising to address the Court, remarked: "May it please the Court, I am about to make a very short and a very excellent argument, for Mr. Justice Wilde once stated to me that he considered that the first proposition always included the last. I shall submit the case upon the record." The Bench was unanimously of opinion that it was a model argument.

Mlle. CHAUVIN, one of the few lady barristers in France, has just acted as counsel in an action for infringement of patent corsets. The court room is described as resembling a music-hall stage rather than anything else, so numerous were the elegantly dressed ladies, examining with expert feminine eyes the multitude of corsets ranged in line. It was precisely these corsets that led to the present litigation, and procured for the public the pleasure of listening to the lady barrister. The learned counsel, it seems, edified the court with such elaborate technical details regarding corsets that her male adversary was fairly confounded, and the magisterial mind so bewildered as to require eight days to ponder over the matter before pronouncing judgment. It may be recalled that some years back Mlle. Chauvin had to fight tooth and nail against prejudice and precedent in order to secure the right to practise as a barrister, after passing very brilliantly all the needful examinations. She now appears to be reaping the reward of her patient, persevering struggle, which some time ago was the topic of the day in Paris. — *The Law Times*.

A SHORT time after a recent political convention in which his faction of his party was badly worsted, Judge N. M. Hubbard, of Cedar Rapids, Iowa, was asked to go on an entertainment and replied:

"No, I can't go."

"Why?"

"Well, I don't feel like it."

"What is the matter?"

"Well," said the judge, reminiscently, "I feel like a gambler I once knew, who had played all night and drank to quench a great thirst. About four o'clock in the morning his head was

foggy and he was groggy on his feet, and the last of his money had disappeared. He got up and staggered to the bar and said to the bartender:

'I want you to do something for me.'

'No,' said the bartender, 'I can't.'

'But you don't know what I want.'

'Yes, I do; you want whisky, and you have enough now.'

'No, there you are mistaken. I don't want whisky. I only want a couple of glasses of cold water and a few kind words.'

To another inquirer, who asked how he felt, Judge Hubbard told the story of a well-known character of his State, "Uncle Jimmie" Jordan, who was once a candidate for State senator in the Polk district. Jordan received the Republican nomination and had a big majority to go on, so felt perfectly confident about his election. A man named Mitchell, who lived in the eastern corner of the district, was nominated against "Uncle Jimmie" on an independent ticket, and was indorsed by the Democrats. Election day, to the amazement of all true-blue Republicans, Mr. Jordan was beaten by Mr. Mitchell. Jordan retired to his farm, and was not seen in the city for several days. Finally one day he drove in and a citizen hailed him, as he was going by on the street, and asked him how he felt.

"Uncle Jimmie" leaned out of his wagon and in a high-key voice, which was heard all over the street, answered:

"Well, I tell you how it is, I feel like Lazarus when he had been licked by the dogs."

THE bailiff of Guernsey, says *The Law Journal*, "is not only the chief magistrate of the island, but also the president of its legislative assembly. The judicial system of which he is the head is simple to the point of quaintness. He is assisted in the Royal Court by twelve jurats, who are elected for life by the rate-payers. The presence of two or three of these jurats (*nombre inférieur*) is deemed sufficient when he sits at a court of the first instance; the attendance of seven (*nombre supérieur*) is required when he hears appeals. Not the least curious thing is that the bailiff sits to hear appeals from his own decisions. It is a delightfully simple system, and works admirably — in Guernsey."

THE following poetic deed is recorded with Cass County, Illinois, Deeds, volume 40, page 251 :  
 I, J. Henry Shaw, the grantor herein,  
 Who live at Beardstown, Cass county, within,  
 For seven hundred dollars, to me paid to-day  
 To Charles E. Wyman do sell and convey,  
 Lot two (2), in block forty (40), said county and town,  
 Where Illinois river flows placidly down.  
 And warrant the title for ever and aye,  
 Waiving homestead and mansion, to both  
 good-by,  
 And pledging this deed is valid in law,  
 I add here my signature, J. Henry Shaw.  
 (Seal.) Dated July 25, 1881.

I, Sylvester Emmons, who live at Beardstown,  
 A justice of peace of fame and renown,  
 Of the county of Cass and Illinois state,  
 Do certify here that on this same date,  
 One J. Henry Shaw to me did make known,  
 That the deed above and name were his own.  
 And he stated he sealed and delivered the same,  
 Voluntarily, freely, and never would claim,  
 His homestead therein; but left all alone,  
 Turned his face to the street and his back to  
 his home.  
 (Seal.) S. Emmons, J. P.  
 Dated August 1, 1881.

A CURIOUS old labor law exists in the Isle of Man. A farm laborer was . . . charged, under the provision of a Manx statute of 1665, with refusing to complete the year of service for which he engaged with his master. The penalty provided by the statute is that the servant is to be kept in prison and allowed one cake and one cup of water per day until he returns to the service. In this case the laborer disputed the allegation that he had engaged to work for a year, and the Deemster, saying that he was not satisfied that the laborer had so engaged, discharged him. — *The Law Journal*.

WHAT is a mummy? As judges do not seem to be quite clear on the point, it is not, perhaps, reasonable to expect that coroners should be better informed. Yet the story that has just been told in the King's Bench division, of a coroner's inquest solemnly held in the city of London in the year of grace 1899, on a Peruvian

mummy in transit from Peru to its final resting-place in a Belgian cemetery, certainly does seem to show that "crown's quest" law and practice can be as silly now as, according to the gravedigger, it was in the days of Hamlet. Mrs. Aitken, the plaintiff in the recent action, obtained a mummy in Peru, reputed to be the mummy of a lady Inca, and brought it to Europe for presentation to the fathers of the *Maison de Melle* in Belgium. Now Peruvian mummies differ widely from the well-known Egyptian variety. They are not embalmed, nor are they enclosed in cases. They appear to be merely sun-dried and then wrapped in cerements of a peculiar fabric with the knees drawn up to the body and the head bowed down to the knees. They are said to be rare, though it is hard to see why anyone should care to possess an object so unsightly and so little edifying, but their market value is not high, according to the experts, perhaps because their physical condition is not, let us say, quite so stable as that of an Egyptian mummy. Not to put too fine a point on it, it appears to be quite possible for a Peruvian mummy to be shipped in Peru as a highly sun-dried specimen and to be landed in Europe in a condition to which the word high can only be applied in a very different sense. Be this as it may, Mrs. Aitken brought her mummy to England apparently in good condition. She examined it on the voyage and found it quite innocuous. It was landed in Liverpool and there consigned to the London and North-Western Railway for transmission to the *Maison de Melle*. Here its amazing adventures began.

"One case, mummy" is the bold and curt description under which the hallowed remains of a lady Inca, now "unhousel'd, disappointed, unanel'd," were consigned to the railway company or its agents. They accepted it as such, though when, having lost or mislaid the invoice, they opened and examined the case, they attempted to charge for it as a "corpse," but afterwards dropped the claim. Whether mummy or corpse, the unhappy remains duly arrived at Broad street on their last long journey. There a strange thing happened. Having lost the invoice, the railway company found it necessary to open the case to ascertain its contents. There was said to be a "stuffy odor" about the box, as might easily be the case when even less

perishable articles than sun-dried mummies are detained in the goods station of a London railway while the consignees are looking for a lost invoice. On finding it contained what experts might pronounce to be a mummy, but what by the mere policeman was sure to be regarded as a corpse, the authorities communicated with the coroner, and this egregious official, not being an expert in mummies, took a strictly professional view of the matter. He summoned a jury and held an inquest. The jury evidently entered into the humour of the situation, and returned the following verdict, which shows how thoroughly and conscientiously they discharged their duty: — "That the woman was found dead at the railway goods-station, Sun street, on April 15, and did die on some date unknown in some foreign country, probably South America, from some cause unknown. No proofs of a violent death are found, and the body has been dried and buried in some foreign manner, probably sun-dried and cave-buried, and the jurors are satisfied that this body does not show any recent crime in this country, and that the deceased was unknown and about twenty-five years of age." It seems to us that the jurors were very sensible men. They stated the facts before them with lucidity, precision, and caution, withal, and with no little subdued humour. Theirs not to reason why they were summoned to sit on a mummy. That rested with the police and with the coroner. Avoiding the legal pitfalls of mummy or corpse, they showed, nevertheless, that there was no rational ground for an inquest, and thereby passed a covert vote of censure on the coroner for making fools of himself and them. It is this gentleman's procedure that seems to be most open to criticism. A London coroner should have something better to do than to hold inquests on mummies and more sense than to do it. He has not even the excuse of the coroner in a remote district of the United States whose story is told by some American humorist. This ingenious person, finding business slack in his district, hit upon the expedient of digging corpses up in the churchyard and throwing them into the adjacent river. When they were fished out he summoned a jury and held an inquest. The precedent is tempting to a man of humour, but it is scarcely applicable to London coroners and Peruvian mummies.

However the poor mummy got its quietus at last. After the farce of the lost invoice and the grotesque inquest, the railway company duly delivered it at the *Maison de Melle*. But by this time it was scarcely distinguishable from a corpse, and the Belgian authorities promptly ordered it to be buried as such in the public cemetery. "It is supposed," wrote the reverend father who told the last sad story of its fate to Mrs. Aitken, "that the moist air of the sea and of the climate of England has caused the beginning of a decomposition in the fleshy parts. Whatever may be the truth, the fact is that the poor mummy rests now in the cemetery at Melle" — and to do him justice the reverend gentleman, though full of gratitude to Mrs. Aitken for "all her kindness and trouble," does not seem to have thought that his museum was exactly the right place for it. We should say that the cemetery was a much better place, and we might almost add that the cemetery in Peru, from which the mummy was originally extracted was the best place of all. Peruvian mummies are cheap, it appears, but then they are rather apt to be nasty. Their archæological interest is hardly sufficient to justify their deportation to a climate and atmosphere in which they cannot be trusted not to turn back into corpses. Let us hope that henceforth they will be left for the most part to the kindlier keeping of the sun which has dried them and the caves which have held them in Peru. But railway companies which lose the invoice of a mummy and then connive at the absurdity of a coroner's inquest, which might have the effect of getting rid of the *corpus delicti*, must expect to pay for their negligence. So the jury seems to have thought when it awarded Mrs. Aitken compensation to the amount of £75. In spite of the forensic dispute between Mr. Justice Darling and Mrs. Aitken's counsel as to whether a mummy is always a mummy, and a corpse always a corpse, the finding of the jury seems to us to be full of common sense. If the railway company had not managed to lose the invoice, nothing would have been heard of the distinction. Nor will it enhance the reputation of the London and North-Western Railway with the public to find that the attempt to charge as a corpse for a consignment accepted as a mummy had to be abandoned and found no defence in court. — *The Times* (London).

LITERARY NOTES.

WE venture to say that no one of the many readers who have accepted Mr. Holman Day's invitation to "have a chat 'bout common things in Maine" has thrown down in disappointment the author's recent book<sup>1</sup> of verses. His muse, indeed, inspired no lofty flights; the verse is

A homely rhyme, and easy understood —  
An echo from the weird domain of Spruce;

but these poems give true and interesting glimpses of northern New England life and are good reading. As in the reading of all dialect poems homeopathic doses are to be prescribed,—but in the present instance repetition of the dose at frequent intervals can be advised.

A pleasing variety marks these verses from the fact that Mr. Day finds his material in the inland country town, "long shore," and in the logging camp. A shrewd, homely sense of humor is the dominant note of the book, but with it is a judicious mixture of sentiment and pathos. Once, indeed, in his "Rear of the Drive" Mr. Day strikes quite a Kiplingesque pace.

But it is proper to note, for legal readers, the verses which have a professional interest. For example, there is the log-driver's complaint against "The Law 'Gainst Spike-Sole Boots." Certainly — from his point of view —

It's a blank of a note that a man with chink  
Can't prance to the rail and get his drink,  
But it's fine and costs if ye mar the paint,  
And ten if the feller that makes complaint  
Gets mad at a playful push in the eyes  
And goes into court with a lot of lies.

The sympathy of their legal brethren we bespeak for the unfortunate lawyers who, from time to time,

Tried to settle down in Hudson, but they couldn't  
earn a dime,  
Never got a speck of business, never had a single  
case; —

for in Hudson

. . . . . Rows were always settled young  
By the pacifying magic of Micajah's ready tongue;

<sup>1</sup> UP IN MAINE. Stories of Yankee life told in verse by *Holman F. Day*. With an introduction by *C. E. Littlefield*. Fourth edition. Boston: Small, Maynard and Company. 1901. (Cloth, xv + 209 pp.)

all because of a pernicious local custom, —

'Cause they wont fork up a fee,  
Long's he's round to referee.  
'Case of difference or doubt  
Folks say, 'Wal, we'll leave her out  
To Uncle Micajah Strout.'

It may be a question, however, whether it be not better to lack practice altogether than to have to be content with such a fee as fell to the lot of Squire Crane.

UNCLE BENJY AND OLD CRANE.

ONCE there was a country lawyer, and his name was Hiram Crane,  
And he had a reputation as the worst old file in Maine.

And as soon's he got a client, why, the first thing that he'd do  
Was to feel the critter's pocket and then soak him 'cordin' to.

Well, sir, one day Benjy Butters bought a hoss, and oh, 'twas raw  
Way old Benjy he got roasted, and he said he'd have the law.

So he gave the case to Hiram, and then Hiram brought a suit  
And got back the hoss and harness and what Benjy gave to boot.

When he met him at the gros'ry Benjy asked him for the bill.

And when Hiram named the figger, it was steeper'n Hobson's hill,

Poor old Benjy hammed and swallowed — bill jest sort of took his breath,

And the crowd that stood a-listenin' thought perhaps he'd choke to death.

But it happened that the squire felt like jokin' some that day,

And he says, "Now, Uncle Benjy, there won't be a cent to pay

If you 'll right here on the instant make me up a nice pat rhyme;

Hear you're pretty good at them things — give you jest three minutes' time."

And the squire grinned like fury, tipped the crowd a knowing wink,

While old Benjy started in, sir, almost 'fore you'd time to think,

"Here you see the petty lawyer leanin' on his corkscrew cane.

Sartin parties call him Gander, other people call him Crane,

Though he's faowl, it's someways daoubtful what he is, my friends, but still

You can tell there's hawk about him by the gaul-durned critter's bill."

Crane got mad, he wanted money, but the crowd let on to roar,

And they laughed the blamed old skinflint right square out the gros'ry store.

## NEW LAW BOOKS.

A TREATISE ON INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES. By *Thomas Carl Spelling*. Second Edition. 2 vols. Boston: Little, Brown and Co. 1901. (clxii + 1894 pp.)

In any analysis of the law a first distinction to be taken is between the law in relation to the right and the law in relation to the remedy, the distinction that is between substantive law and adjective law. And yet that is a partition which in any treatment of any given legal question it is impossible to make; for in any such question right is bound up with remedy and remedy is bound up with right. It is all one issue; of what use is right without remedy, or remedy without right. This work, "*Spelling on Extraordinary Remedies*," is a treatise upon adjective law; it may then be admitted that it cannot escape consideration of the substantive law; but it must be said that it makes no attempt to avoid discussion of rights and wrongs in general; rather it proceeds upon the theory that the various subjects of the substantive law must be taken up one by one and the remedy designated in each one by one. Thus the author, in effect sets himself the impossible task of writing a book upon rights and wrongs in general and in particular. For example, under Injunction there are chapters: Pertaining to Real Property, Pertaining to Contracts, even Pertaining to Partnerships, Pertaining to Corporations. The explanation of this, and doubtless it is complete, must be the greater value of the work to the lawyer in practice, — if the practitioner gets in one chapter all the law, right and remedy, he is well content, and rightly so.

Not all remedies are considered in this treatise, the extraordinary remedies are its subject. It occurs therefore to inquire what remedies may be said to be ordinary, and what remedies may be said to be extraordinary. There is one fundamental division between remedies, but these words are hardly precise enough to mark it; nor does this author intend exactly that division. Yet, the elemental partition seems to be between a remedy which gives a compensation for the wrong and a remedy which gives a compulsion for the right; in the first the remedy is in damages, in the second the remedy is in specie; the first is the characteristic of common law process with its sheriff, the second is the char-

acteristic of equitable process with its prison: thus compensatory reparation is ordinary in law, while specific reparation is extraordinary; specific reparation is ordinary in equitable process, while compensatory reparation is extraordinary. The author adverts doubtless to the remedy of specific reparation when he defines his field as the extraordinary remedies; but why then include injunction at so great length, and at the same time omit specific performance altogether; especially since in case of contract at least these remedies are so interdependent that the result in equity depends upon a knowledge of each.

At law it is indeed an extraordinary remedy that results in anything else than damages. Of these few extraordinary remedies mandamus is of most importance, at the present time most clearly so. A prerogative writ, mandamus is only granted where in justice and good government there ought to be one, because of defect of police, as Lord Mansfield said. The part the mandamus plays in forcing public officers to the performance of their duties is not commonly appreciated; in a decentralized administration such as we have in all the United States, unless there were such a power in the courts the execution of the law would come to an end. At the same time the part that the courts by virtue of the mandamus assume to play in the government is not generally felt. When we see in some States the courts issue mandamus to the governors, we begin to inquire whether we have given over all our government to the courts. Truly the opposing argument that our author sets forth should be urged: that under our form of state government, where the powers of government are separated into three distinct branches — legislative, executive and judicial — each should be kept free from interference by either of the others within its proper sphere. More than this, if the courts so assume to control the action of the administration they must never interfere by mandamus unless the action of the administration has been beyond all discretion. That is, the attitude of the courts toward the legislature which supports all statutes that can in any reason be thought constitutional should be taken here also toward the administration. This is what the doctrine of separation of powers means in American constitutional law.







*R. Thum*

# The Green Bag.

---

VOL. XIV. No. 4.

BOSTON.

APRIL, 1902.

---

## SALMON PORTLAND CHASE.

By FRANCIS R. JONES.

“THERE is one glory of the sun, and another glory of the moon, and another glory of the stars; for one star differeth from another star in glory.” And surely Mr. Chief Justice Chase differed vastly from his predecessors in office. A child of New England, a foster son of the new and golden West, he was a new type of Chief Justice. It may as well be said at once that he was not a better type. He was what was unanalytically and patriotically called a true American. If that term means a devotion to country and a greater devotion to self, a breezy self-centeredness and an elbowing, pushing ambition, then it must be conceded that it was rightly applied to him. His ambition obscured his view of the just relations in which his positions placed him. He seemed to have a strange disregard for the dignity of those positions, and an overweening sense of his own personal importance. He represented a new era in our politics. His accession to the Chief Justiceship marked a distinct degradation in the attributes and attainments previously considered requisite for that high position. He was an arrogant man without the saving sense of humor. He had an inflated conception of his own abilities. He was insistent upon the adoption by others of his own ideas and policies. He was always to the very end of his life an aspiring politician, whose great virtues of spotless integrity and unswerving adherence to the principle of freedom for the slave alone palliate his later rather devious

political career. Again and again he sought the Presidency in vain. Yet he was a man of great parts, of great decision and firmness, of intense, unyielding industry, of tremendous persistence in accomplishing the work he had in hand. He was no time server or opportunist or trimmer, but a resolute man of action. He sought to compel events. His courage was almost truculent, although untinged by cowardice. His executive ability was remarkable, and his genius for organization unrivalled. His intellect was clear and his reasoning powers sound, although not quick or brilliant. His life was austere and his principles puritanical. His was a character which inspired rather admiration than friendship. Single-handed, by the very force of his personality, he accomplished great things and the nation owes him a deep debt of gratitude.

Ohio was admitted to the glorious company of the States in 1802. Then began, at first feebly, but with ever-increasing strength and grandeur the development of the great West. With ever-accelerating pace the western country grew until it became the centre of population and of political importance. But long before it reached that proud position it was a force that had to be reckoned with, an element that had to be considered, and, if need were, conciliated. With only the Ohio River, a tie to bind it to and not a barrier to separate it from slaveholding Kentucky, with many of its inhabitants emigrants from slave States, the slavery question early became of interest

within its borders, until, earlier than elsewhere, it grew to paramount political importance. Ohio was the political hothouse of practical anti-slavery organization, and the first great anti-slavery leader and champion of the West was Salmon Portland Chase. Organized out of the territory subject to the Ordinance of 1787, Ohio had a peculiar interest in and could speak with an authoritative voice on the subject of the constitutional import and extent of that act. As Mr. Chase said in his argument before the Supreme Court of the United States in the *Van Zandt* case: "Ohio in truth came into the Union not so much in virtue of any act of Congress consenting to her admission, as in virtue of a right secured to her by the Ordinance, and which could not have been denied to her without a flagrant breach of faith. The Ordinance itself provided for the erection of States within the territory. . . . It was the right of the people within the limits thus defined to form their State government and come into the Union whenever the number of inhabitants should reach sixty thousand, and earlier, if consistent with the general interests of the Confederacy. As it was then their right to come in under the Ordinance, and as it was by that instrument made their duty to frame their government and constitution in accordance with the articles of compact, it seems impossible to maintain that, by the act of entering the Union, any of those articles could be abridged, impaired or in any way modified."

It is perhaps impossible for one of the present generation to give successfully a correct and vivid conception of the varied life of the West in the first half of the last century. The political questions which then agitated Ohio are buried, never to be exhumed. The commercial interests have so changed that the original causes for the upbuilding of its wealth and population are well-nigh forgotten. The methods of banking and finance, the money centres, and

even the money itself are so different, that they are unrecognizable. The social conditions were then amorphous. The society made up of so many and so diverse elements has since become amalgamated and fused into a coherency, bearing no resemblance to its parts. All these subtle influences must have had their power for good or bad over the individual living in their midst. Especially powerful must have been their force upon a young and ardent man, who went with hopeful expectations from the East and entered upon the new and strange life with the zest of youth and the determination to succeed.

The early life of Mr. Chief Justice Chase was full of incident. But its incidents were of the commonplace order, to which it is hard to give either color or interest. They were ephemeral. His life was that of a politician rather than of a lawyer. And although from 1837 on to almost the end of his life he was valiantly struggling for one great principle, the freedom of the slave, the pitched battles of that struggle were few and undramatic. Until towards the end they were apparently evanescent. When successful at all, the success seemed only temporary. But he fought on, undismayed. At first he was in a pitifully small minority, despised and ostracized by nearly all classes of society. In the end he seemed to be literally lost among the great majority. This moral fight, so strenuously and tenaciously made, reveals the greatness of his character. It was he who pushed the anti-slavery principle on to the plane of practical politics, and organized the anti-slavery cohorts and led them again and again after defeat heaped upon defeat. It was due to his genius and intrepidity more than to those of any other, that success for the cause came at last in the election of Abraham Lincoln to the Presidency. Again, in his administration of the Treasury department, no just conception can be given of the magnitude of the work which he accomplished, without going into the driest details

of finance and statistics and writing a history of the times from the point of view of the Treasury of the United States. These details and such a history are forbidden to the compass of this article.

Mr. Chief Justice Chase was born at Cornish, N. H., on January 13, 1808. There the first eight years of his life were spent, "ambitious to be at the head of my class and without much other ambition," as he said in a letter to Mr. John T. Trowbridge, "with old Ascutney looking down upon me every morning from his mists, and every evening from his royal panoply of gilded clouds, the old Connecticut River rolling by, and the Connecticut Valley meadows and New Hampshire hills over which to roam." His was the ordinary childhood of the country boy of New England three generations ago, with plenty of work to do about the farm and the elementary instruction of the country school. When he was eight years old his father moved to Keene, and in a few months thereafter died, leaving a much-encumbered estate and a widow with a large family. Mrs. Chase seems to have been a typical New England woman, a self-sacrificing mother. She had a shrewd capability of getting large returns from a very meagre income. Apparently dissatisfied with the school of Keene she sent her son, Salmon, to Windsor, Vt., for the winter of 1817-18, where he was under the charge of a Colonel Dunham, who taught him Latin. Upon his return from Windsor to Keene the boy began Greek in 1819 with a Reverend Mr. Barstow, and also took up Euclid. His uncle, Philander Chase, was the Episcopal Bishop of Ohio, an able, energetic and devoted clergyman, who in April, 1820, persuaded Salmon's mother to allow him to take his nephew into his household at Worthington, O. There the twelve-year-old boy continued his school with earnestness and energy until 1822, when the Bishop was offered and accepted the presidency of Cincinnati College, the duties of which position

he assumed in November of that year. Salmon Chase went thither with his uncle and entered the college as a freshman. But he soon conceived the idea that by a little extra study he could be advanced to the sophomore class. This he accomplished in a short time. The Bishop, grieving over the poverty of his diocese, concluded to resign his presidency of the college and go to England to solicit funds for a theological seminary. So in the summer of 1823 he went East, en route for London, taking Salmon with him. From Troy the boy walked home to Keene across the mountains. Soon after his return he was engaged to teach the school at Roxbury, N. H. His initial success in that position, however, was so small that he was discharged in less than a fortnight. In February, 1824, he entered the junior class of Dartmouth College, where he graduated in 1826, meanwhile eking out his scanty means by teaching school. He had a predilection for the ministry, but finally concluded to adopt the profession of the law. In December, 1826, he proceeded to Frederick, Md., where he intended to establish a school. But hope of success there vanished and he went on to Washington, where he advertised that he would open a select classical school for not more than twenty pupils. He had only one candidate for instruction. In despair he solicited his uncle, Dudley Chase, a senator from Vermont, to procure him a clerkship in one of the government departments. This application the Roman senator sternly refused. Mr. Chase, however, soon obtained a position to teach in Mr. Plumley's school, which apparently was a fashionable one at that time in Washington, patronized by the sons of such men as Mr. Clay, Mr. Wirt and General Bernard. In September, 1827, he became a law student in the office of William Wirt, at that time Attorney General of the United States and in the maturity of his splendid genius. He also added to his income by writing, and was prosperous in a small way, although the

drudgery of teaching was extremely distasteful to him. He was pleasantly received at the home of the Wirts and seems to have had more or less social success throughout his three years in Washington. There, too, he got his first insight into politics, and saw and heard the eminent men who were then in official life at the Capital. During these three years the administration of John Quincy Adams ended and that of Andrew Jackson began. It is interesting to note that so early as 1828 Mr. Chase was committed to the anti-slavery cause. In that year he was one of those who drew up a petition to Congress praying for the abolition of slavery and the slave trade in the District of Columbia. This was his first public political act. He had great admiration and love for Mr. Wirt, who, in 1829, wrote him a letter predicting for him future distinction and proffering him advice and friendship. On December 21 of that year he was examined for admission to the bar by the venerable Judge Cranch, who would not have admitted him except for Mr. Chase's pathetic plea: "Please, your honor, I have made all my arrangements to go to the western country to practice law." Evidently the learned judge considered that Mr. Chase had acquired a sufficient knowledge of the law to practice in the West.

The three years of boyhood spent in Ohio largely determined the choice of his residence. Yet, as at this time he wrote to a friend: "I would rather be first twenty years hence at Cincinnati than at Baltimore," he apparently divined the future growth and importance of the West. He reached Cincinnati in March, 1830, and was admitted to the bar of Ohio in the following June, and at once entered upon the practice of his profession. His industry brought him a clientage. Although its beginnings were small, it steadily increased. Pending professional engagements which would consume his time he entered into the life of Cincinnati, then the largest city of the West, and soon be-

came well known. During the first three years of his residence there he compiled the statutes of Ohio, familiarly known as Chase's Statutes. This was a work of magnitude, and gained him some distinction. The annotations and references are accurate and valuable, and the work called forth letters of commendation from Chancellor Kent and Mr. Justice Story. But Mr. Chase's legal attainments were not excessive. He was, as a friend said: "Not a great lawyer, but a great man who had a knowledge of the law." His business was chiefly commercial. At one time he was counsel for the United States Bank, the business of which he lost in 1841, because his fees were considered too high. About that time, too, he became so engrossed in politics that ten years later his practice had decidedly diminished. The greatest cause in which he was engaged while at the bar was the celebrated telegraph case of *O'Reilly v. Morse*, 15 Howard 62, which he successfully argued before the Supreme Court of the United States in 1853. From the time that he gained a reputation as a lawyer he attached to himself many young men, like George Pugh, at first his supporter and afterwards his political rival, Stanley Matthews and Edward L. Pierce. He had none of the arts of the orator. He appealed solely to the reason of his hearers. He was an effective speaker, although the impression made by his grand, imposing and dignified presence was marred by a hesitancy and thickness of speech, and his speeches read better than they sounded. His great strength lay in the preparation of briefs, and later, in the writing of political addresses and platforms. In this talent he much resembled his predecessor on the bench of the Supreme Court of the United States, the first Chief Justice, John Jay.

The mob, which in July, 1836, at Cincinnati, destroyed James G. Birney's printing press, wrecked the office of his paper, "The Philanthropist," and threatened personal violence to the subsequent candidate for the

Presidency, aroused all of Mr. Chase's love of justice, of freedom of speech and of the press. He took part against the mob. In an autobiographical fragment he says: "From this time on . . . I became a decided opponent of slavery and the slave power . . . I differed from Mr. Garrison and others as to the means by which the slave power could be best overthrown and slavery most safely and fitly abolished under our American Constitution; not in the conviction that these objects were of paramount importance. In 1837 I first publicly declared my views in respect to legislation under the Constitution." When once convinced that a cause was just and that it was his duty to advocate it, no power could turn him from it. To this trait of his character is principally due his noble espousal of the cause of anti-slavery. Consider what this meant. He was ambitious. Remember the hatred and suspicion that even almost every good man then heaped upon anyone who advocated humanity to the slave. Nevertheless, with seemingly nothing to gain and everything to lose, before he was thirty he threw himself with all the energy of his nature into the fight. He brought to it all his wonderful genius for organization, all his instinct for politics. For it he threw away his chances for political and professional preferment. For it he brooked the loss of friends and the abuse of enemies. For it he jeopardized any hope that he had for wealth. He antagonized both Whigs and Democrats. For twenty years he fought an apparently hopeless fight, without passion, with the persistence of pure reason. One cannot but give the most unstinted admiration and praise to his perfect poise, his insistent energy, his magnificent courage. He took the question out of the domain of mere vituperation and iconoclastic pessimism, where Phillips and Garrison had placed it. He made for it a working and tenable political theory. He clothed the doctrine with the Constitution, and argued it until it could not

be answered. He was not an abolitionist. He wanted to confine slavery to the territory where it then existed. He stated the doctrine in an address to the Liberty Party in July, 1845, as follows: "Against these infractions of the Constitution, against these departures from the national policy originally adopted, against these violations of the national faith originally pledged, we solemnly protest. Nor do we propose only to protest. . . . We have the example of our fathers on our side. We have the Constitution of their adoption on our side. It is our duty and our purpose to rescue the government from the control of the slaveholders; to harmonize its practical administration with the provisions of the Constitution and to secure to all, without exception and without partiality, the rights which the Constitution guarantees. . . . We believe that its removal can be effected peacefully, constitutionally, without real injury to any, with the greatest benefit to all. We propose to effect this by repealing all legislation and discontinuing all action in favor of slavery, at home and abroad; by prohibiting the practice of slaveholding in all places of exclusive national jurisdiction, in the District of Columbia, in American vessels upon the seas, in forts, arsenals, navy yards; by forbidding the employment of slaves upon any public work; by adopting resolutions in Congress, declaring that slaveholding in all States created out of national territories is unconstitutional, and recommending to the others the immediate adoption of measures for its extinction within their respective limits; and by electing and appointing to public station such men, and only such men as openly avow our principles, and will honestly carry out our measures." This extract is an excellent example of Mr. Chase's diction, clear, forcible, logical. It carries one on with a sweep that never lets the interest flag.

Up to 1841 Mr. Chase had little to do with practical politics. In 1832 he had been a delegate to the convention that nominated

Clay for the Presidency. In 1836 and 1840 he was still a Whig, and voted for Harrison. But in May, 1841, he took an active part in the county convention of the Liberty Party in Cincinnati. He had come to see that there was no hope from either of the two old parties for an anti-slavery policy. The Liberty Party at that time was feeble and discouraged. Chase built it up, shaped its policy, merged it first into the Free Soil and then into the triumphant Republican Party. His accession to the Liberty Party was a great joy to its adherents. There was plenty of work for him to do. He almost immediately became its leader. He organized its conventions, wrote its platforms and addresses, planned its campaigns. Issues were plenty, the slave trade, the fugitive slave law, the Texas question, and after 1846 the Wilmot Proviso. The progress of the party, however, was slow. In April, 1847, Chase wrote to Senator John P. Hale: "I see no prospect of greater future progress, but rather of less. As fast as we can bring public sentiment right, the other parties will approach our ground." Dissensions in the councils for the Liberty Party appeared in 1847, and in the Presidential campaign of 1848 Chase secured the call for a national Free Soil convention, and formally dissolved the Liberty Party of Ohio. He hoped to force the Democracy to adopt his ideas. To his influence was due the nomination of Van Buren by the Free Soilers. During all these years, and after, Chase was engaged in litigation concerning fugitive slaves. He accepted their briefs without fees and fought the cases with all his energy and ability. So constantly was he employed in this work that he came to be called "the attorney general for runaway slaves."

In 1848 Chase's reward came unexpectedly. The union of Free Soilers and Democrats had been barren of result in the presidential election. But in Ohio a Senator was to be chosen. The Ohio Legislature was evenly divided. Two Independents held the

balance of power. By their combination with the Democrats Chase was elected, and took his seat in the Senate of the United States on March 4, 1849. Now had come his first great opportunity. He considered himself as the representative of the anti-slavery forces of the West. But as a member of a small and despised party, elected by an accident, he received very little consideration and was given no important committee appointments. He sympathized with the Democrats, and said, in July, 1849: "The doctrines of the Democracy on the subject of trade, currency and special privileges command the entire assent of my judgment." Yet for two years he stood almost alone. Hale, he said, was a guerrillist; Seward, a Whig partisan. Wade and Sumner came to his aid in 1851, Hamlin, Fessenden and Everett in the conflict over the Kansas-Nebraska bill. Handicapped though he was Mr. Chase was a successful representative of Ohio. He was watchful over the expenditures of public money, impatient of delay, and secured Federal buildings and improvements for his Commonwealth. Yet he felt that his energies belonged to the cause of anti-slavery. For that cause he spent them freely. His speeches on the Compromise of 1850 and the Kansas-Nebraska bill had an incalculable effect throughout the country, and much added to his reputation. He became a national character. The appeal of the Independent Democrats was written by him, and published on January 25, 1854. It unmasked the design of Douglas, who came into the Senate on the thirtieth, and attacked Chase with reckless fury. The latter met the onslaught with undaunted front. In this contest he showed himself a bold parliamentarian, a sagacious and skillful leader. It was this debate that was the efficient cause of the birth of the Republican Party. After it the Northern wing of the Whig Party could no longer affiliate with the Southern, nor could the Independent Democrats follow Douglas. Chase, more than any other man,

brought about this situation, which was so pregnant of results. In 1851 his assertions of his Democracy somewhat separated him from the Free Soil Party. But in 1852 he was compelled to return to it by the nomination of Pierce to the Presidency by the Democrats. In the next year Chase made a strenuous campaign in Ohio, but the Legislature returned had a clear Democratic majority, and Pugh was elected to his seat in the Senate. Unlike Clay, Webster and Seward, on no phase of the slavery question had he yielded or compromised. He had made himself a power in the Senate. There was no one to take his place.

Immediately upon the passage of the Kansas-Nebraska bill steps were taken to organize a new party. In this great movement Chase had a large share. In Ohio the State election showed a majority of eighty thousand for the Republican ticket. In the following year Chase was nominated by that party for the governorship and elected. Ohio had now become a pivotal State in national affairs, but its chief magistrate had very little power and no right of veto. With very few appointments and hardly any official prestige the Governor had small opportunity to affect the destiny of the State. Yet he was certain to be held responsible for the faults of subordinate officers over whom he had no control. Chase was not a popular Governor. He did what he could with his accustomed efficiency. He said of his administration: "I sought to promote all practicable reforms;

. . . endeavored to reorganize the military system of the State, and omitted no opportunity of making the voice of Ohio heard on the side of freedom and justice. At the same time I endeavored, as far as practicable, to conciliate opposition founded on misapprehension, and succeeded finally in organizing a compact and powerful party, based on the great principles of freedom and free labor." Meanwhile he began to look for a wider field. His position in national politics was eminent. He already saw the

triumph of the cause for which he had so long and so ably fought. He believed that he had the qualities of a President, and that he stood for the principles of the Republican Party. He entered upon a personal canvass for the nomination in 1856. The result is known. Again in 1860 he sought the Republican nomination to the Presidency, and it seemed to be within his grasp. In 1857 he had been triumphantly re-elected Governor of Ohio. In 1858 he went to New England and to commencement at Dartmouth. This tour was apparently for political purposes only. He stirred up his old friends to work for him. He beguiled his old rivals to take the field for him with enthusiasm. It was important for him to keep his standing as a public man by showing his strength in Ohio, and on February 3, 1860, he was elected for a second time to the Senate of the United States. All his activity was in vain. Lincoln was nominated and elected. Chase was one of the commissioners from Ohio to the abortive peace conference at Washington in February, 1861, and in March was made Secretary of the Treasury by the President.

It is impossible here to more than refer in the barest generalities to Mr. Chase's administration of the Treasury. The responsibilities of that position at that time were enormous, the work stupendous, the problems novel. He ably met them all. To the great Secretaries of the Treasury, Morris and Hamilton, must be added the name of Chase. Previously unacquainted with finance, unlearned in political economy, his success was marvellous, his judgment unerring. What mistakes he made were forced upon him by the exigencies of circumstances, not because he had faith in the measures adopted. For three years he worked incessantly, unsparingly. He seemed almost to extort bread from stones, and turn water into wine. He provided funds for the government with which to carry on the war. He reorganized the whole Treasury department. He evolved and forced



through Congress the national bank system. He provided for the confiscation and sale of rebel property. He supervised the prohibitions of trade with the enemy. Through it all he was insistent upon the vigorous prosecution of the war. He wrote to the generals of the army urging action. He constantly, in season and out of season, urged the abolition of slavery. He was impatient with Lincoln. The strain of the times was great. Passions were aroused to fever heat. Politics were rampant. All things were unsettled and adrift. Chase was not a man to sink his own personality for the good of a cause. He could not understand Lincoln. Not understanding him, he could not appreciate him. Their intercourse was never cordial. Again and again Chase tendered his resignation because of some minor difference of opinion or some interference by the President with the right, which the Secretary claimed, to appoint his own subordinates. Chase's campaign for the Presidential nomination in 1863 and 1864 severely strained his relations with Lincoln. In that campaign he saw nothing disloyal to his chief or incompatible with honor. He not only greatly coveted the position, but he veritably believed that he would make a better President, and that it was his patriotic duty to try to obtain the place. Lincoln, on the other hand, was in this, as in all things, long suffering. He appreciated the invaluable work which Chase had done and was doing. He respected and honored his ability and his manhood. He said that "Chase is about one and a half times bigger than any other man I ever knew." But even Lincoln's patience was exhausted at last. In June, 1864, there came a political crisis over the question of the appointment of an assistant treasurer at New York. The Secretary for the fourth or fifth time formally tendered his resignation. Much to his surprise and disappointment the President promptly accepted it on June 30. It was hard for the Secretary to believe that the administration could get along without

his services. Mr. Chase went to New England for some weeks, returned to Washington, and then to the West, to support actively and cordially Lincoln's campaign. On October 12, 1864, Mr. Chief Justice Taney died. On December 6 the President nominated Mr. Chase to the vacancy. The nomination was immediately confirmed by the Senate. He had previously expressed himself as desiring this place above all others. But Lincoln's shrewd estimate of men was never better shown than when, prior to making the nomination, he asked Sumner if Chase would be contented to remain Chief Justice.

The appointment was in more ways than one unfortunate. It ended the line of Chief Justices of the United States who were both great and greatly learned in the law. It was impossible for such venerable and able magistrates and lawyers as Mr. Justice Nelson and Mr. Justice Grier to look up to their new chief with admiration or confidence. He had no decided love for his profession, no especial interest in his judicial work, no deep reverence for the judicial function. Yet for eight years the new Chief Justice presided over his court with dignity and grace. His ability was adequate to the great office. Eight years were too short a time, however, for him to make a decided impress upon the course of judicial judgments. His personality, moreover, was not such as to make his influence paramount with his associates on the bench. But he was eminently fitted to deal authoritatively with the grave questions of reconstruction which came before the court for decision, and he studied with vigor to make himself a competent judge upon ordinary matters of litigation. With his previous training it is remarkable that he attained the judicial success that he did. His influence, too, was much curtailed by his unfortunate continued pursuit of the Presidency. The ermine of the judge could not conceal the aspirations of the politician. His mind was executive

rather than judicial. In 1867 he began to make his plans to capture the Republican nomination in the following year. He could arouse no enthusiasm. In March, 1868, it became apparent that Grant would be nominated, and Chase withdrew from the contest. Yet with singular fatuity he strove to grasp the eagerly desired prize at the hands of the Democracy. He was alarmed and disgusted by the measures of the Republicans. While hoping and striving for their nomination he thought that as President he could control and direct the party. But by April he had brought himself to believe that the Republican party had been created for an especial purpose which had been accomplished, that it was a temporary organization, brought into being by a crisis that had passed. At heart he was always a Democrat. As a judge he strove to curtail the limits of Federal power. In September, 1868, he wrote: "I hold my old faith in universal suffrage, in reconstruction upon that basis, in universal amnesty, and in inviolate public faith; but I do not believe in military government for American States, nor in military commissions for the trial of American citizens, nor in the subversion of the executive and judicial departments of the general government by Congress." This is his justification for changing his party. The change was fruitful of no other result than loss of influence and prestige. Again in 1872 he pulled wires for the Democratic nomination. Again his desires and hopes were vain. All these excessive activities and anxieties at last had their effect upon the splendid physique of the Chief Justice. In August, 1870, he had a severe stroke of paralysis. From this he slowly rallied and again sat with the court during the terms of 1871-72 and 1872-73. Upon the rising of the court in the latter year he went to New York, where, upon May 6, he experienced a second stroke, from which he died on the following day.

During the Civil War the Supreme Court

of the United States was in a humiliating position, *silent leges inter arma*. Its jurisdiction was limited by extrajudicial tribunals, its authority impaired. It refused to entertain appeals from those parts of the country that were in rebellion. One of its ablest justices resigned in order to join in the effort to overthrow the government that he had sworn to support. But by 1866 the court began "to render a series of brilliant and far reaching decisions, which at the same time restored its own prestige, crystallized the body of law arising out of the Civil War and moderated the excesses of Congress. All the questions which finally stood forth for judicial decision had been presented to Chase while he was Secretary of the Treasury, and upon most of them he had made up his mind." But I intend here only to refer briefly to four episodes of his judicial career.

Even after President Johnson's two proclamations of April and August, 1866, declaring the war ended, the Chief Justice steadfastly refused to hold any court in Virginia or North Carolina, until all possibility that the judiciary would be subordinate to the military power was removed. Jefferson Davis had been arrested on May 10, 1865, confined in Fortress Monroe, and indicted for treason in the District of Columbia. That indictment, however, was not prosecuted, and in May, 1866, a true bill was found against him in the District of Virginia for waging and levying war upon the United States while owing them faith and allegiance. The penalty for this offence was a fine not exceeding \$10,000, or imprisonment not exceeding ten years or both. The Chief Justice believed that a military commission was the suitable tribunal. But in May, 1867, the President threw the responsibility of Davis's trial upon the judiciary by surrendering him to the custody of the Federal Court under a habeas corpus issued by Mr. Chief Justice Chase. Judge Underwood then admitted him to bail, and the trial was

continued from term to term until June, 1868. Then the Chief Justice for the first time sat as a judge in the Circuit Court for the District of Virginia. By agreement of counsel the case was postponed until the fourth Monday of November. The plea was then made that Davis was one of those included in the Fourteenth Amendment, wherein the penalties enumerated took the place of any previously incurred. The Chief Justice approved it and the Circuit Judge was of the contrary opinion. The Court therefore certified its difference of opinion to the Supreme Court. A few days later, December 25, 1868, the President issued his proclamation of general amnesty, and at the next term of the Circuit Court Davis was discharged.

The most imposing duty which the Chief Justice was called upon to perform was presiding at the trial of the President of the United States, impeached for high crimes and misdemeanors, before the Senate. There were no precedents by which the Chief Justice's conduct could be guided. The trial was instituted by rank partisanship and political intrigue. There was no desire upon the part of the managers of the prosecution for justice. The Republicans of the Senate were hostile to and suspicious of the Chief Justice. They sought by every means in their power to limit his influence and curtail his authority. He successfully insisted that his position was not that of a moderator, but that of the presiding judge of a judicial tribunal. He assumed the right to rule upon questions of evidence, subject to the revision of the Senate, if a vote was demanded. It was agreed by the Republicans that upon the first attempt of the Chief Justice to vote, his right to do so should be denied. But the first tie vote came on a question of the retirement of the Senate for consultation. The Chief Justice immediately voted in favor of adjournment, declared the session of the court closed, and instantly rose from his seat. This prompt and determined action frustrated the designs of the

political cabal and strengthened his position beyond the possibility of successful assault. He deserves great credit for the firmness, calmness and good judgment with which he presided over his trial and for his effort to stamp it with a judicial character.

The Chief Justice considered that his judgment in the case of *Texas v. White*, 7 Wall, 700, was his most important opinion. That was an original suit in the Supreme Court of the United States by the State of Texas to compel the surrender of United States bonds, and for an injunction to restrain the respondents from receiving payment on them from the National Government. The Chief Justice held that when Texas became one of the United States she entered into an indissoluble relation which was final, there was no place for reconsideration or revocation; that she continued to be a State of the Union, notwithstanding the transactions which she had entered into during the Rebellion; and that the government established since the end of the war was a State government *de facto* under the Federal Constitution, and that therefore she had the right to sue in the Supreme Court of the United States. Upon the merits it was adjudged that she was entitled to the bonds.

Since the determination of the case of *Juilliard v. Greenman*, 110 U. S., 421, decided on March 3, 1884, I fancy that there can be few who doubt the constitutional right and power of the government of the United States to issue legal tender paper money. For I believe that the learned and brilliant opinion of Mr. Justice Gray in that case is unanswerable, and has settled the question for all time. But in the stress of the Civil War it was a nice and grave question. At the time the Legal Tender Act was passed Mr. Chase, then Secretary of the Treasury, gave his assent to it and carried out its provisions from a belief in its necessity. He had little time to consider the constitutional question, and if he had an opinion, submitted it to the exigencies of circumstances.

When, in 1869, as Chief Justice he had to consider it in his judicial capacity in *Hepburn v. Griswold*, 8 Wall, 603, he came to the decided conclusion that the act was unconstitutional. As he said at the close of his opinion in that case: "Many who doubted yielded their doubts; many who did not doubt were silent. . . . Not a few who then insisted upon its necessity, or acquiesced in that view, have since the return of peace, and under the influence of the calmer time, reconsidered their conclusions, and now concur in those which we have just announced." Until this decision the Chief Justice had been considered the champion of the legal tenders. No doubt the sluggishness of the Congress to provide for the resumption of specie payments had a large influence in directing his final opinion. He looked upon the continuance of legal tender money as a menace to the country, which ought to be removed at all hazards. He failed to realize that the interests involved were so enormous that it was of the first importance to sustain the constitutionality of the Legal Tender Act. It was one of those instances where, like the Mill Acts, the act simply would have had to be supported, even if it had been unconstitutional.

I shall not enter here upon any extended narrative of the perfectly constitutional, legal and rightful method by which a majority of the Supreme Court of the United States were procured to overrule *Hepburn v. Griswold*. At the time of that decision, on February 7, 1870, the Court was in process of reorganization. Mr. Justice Grier had resigned before the judgment was announced. On the first Monday of December, 1869, an act of Congress went into effect which provided for eight Associate Justices instead of seven. The Court, which by a bare majority of four to three had decided *Hepburn v. Griswold*, was quickly increased to the legal number

by the appointment of Mr. Justice Strong and Mr. Justice Bradley. Thereupon, as soon as might be, the Legal Tender Cases, 12 Wall, 457, were argued. The decision by a majority of five to four overruling *Hepburn v. Griswold* was made on May 1, 1871. The opinions were not delivered until January 15, 1872. In those opinions of the majority and minority there is sufficient and undignified evidence of the great friction among the members of the court. In the opinion of Mr. Justice Strong the Chief Justice was charged with having, as Secretary of the Treasury, "represented to Congress the necessity for making the new issues legal tenders, or rather, declared it impossible to avoid the necessity." The reply of the Chief Justice was frank and manly. "Examination and reflection under more propitious circumstances have satisfied him that this opinion was erroneous, and he does not hesitate to declare it. He would do so, just as unhesitatingly, if his favor to the legal tender clause had been at that time decided, and his opinion as to the constitutionality of the measure clear." He might have gone on and asserted that he had simply returned to the faith of a lifetime, that he saw dangers then from the legal tenders which he had not seen nine years before. But his attitude was unfortunate. It impaired both his reputation and that of his court. Yet his fearlessness was characteristic. His action was that of a strong man, undismayed by the difficulties of his position, conscious of his own rectitude, not afraid to face the imputation of change of opinion. Mistaken though he undoubtedly was, he showed the attributes of a judge. Popular clamor could not swerve him from his path of duty as he saw it. That which brought great abuse upon him seems to me to be the crowning act of his judicial career and of his life. It was an epitome of the man.

CHARLES RUSSELL, BARRISTER.<sup>1</sup>

BY BRUCE WYMAN.

IT will take at least four men to replace you," so Coleridge wrote Russell (p. 103). Indeed it is a strenuous life that this biography discloses. Advocate, legislator, Attorney General, Lord Chief Justice—Lord Russell of Killowen in his time played many parts. This man as we see him here is always in action. He says to a young barrister in a chair at a club: "Why don't you *do* something—anything—only *do* something" (p. 258). This extract will show that Russell lived life according to that idea. "'Russell always wished to be doing something,' says one 'devil.' The following record of a week's doings which I chance to remember will illustrate how untiring he was in work and play alike. The week in question was that of one of the Newmarket spring meetings. On the Tuesday night he travelled, after having been in court all day, down to Newmarket; Wednesday he spent at Newmarket, and, immediately after the races were over started for Stowmarket, where he was advertised to speak at a political meeting at eight. After the meeting he returned from Stowmarket to London, arriving at four o'clock on Thursday morning. All Thursday he was in court, and in the afternoon again went to Newmarket, returning to London on Friday night. On Saturday morning he was again in court, and Saturday afternoon, after the courts had risen, was devoted to some difficult cases for opinion. While he was going through these, a telegram was brought into the room; he passed it to me, and I saw that the purport of it was that the funeral of some friend of his was to take place in Dub-

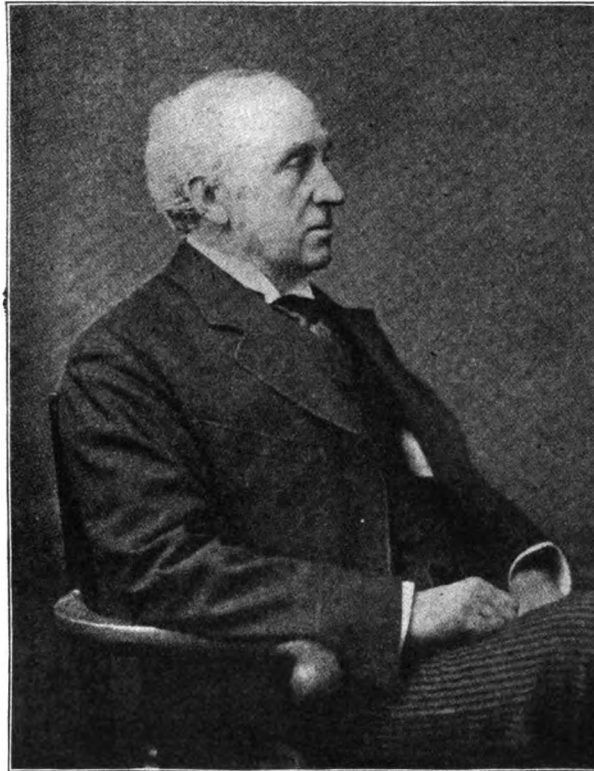
lin on the next day. He said, 'I think I will go,' and thereupon sent to order a sleeping berth at Euston. He attended his friend's funeral in Dublin on the Sunday, arriving in London again early on Monday morning. All Monday he was again in court, and, on the rising of the court, started for Ely to attend a meeting in the evening at which he had promised to speak. In gauging the fulness of the week like this, it must be remembered that each day spent in court entailed careful preparation, and the mastery of at least one new set of facts" (p. 352). So it was from the beginning of his career to its end.

It was Charles Russell, advocate, who made the highest mark. He will be longest remembered in awe as the great barrister. This man was a force. Let this instance witness this: "It is a story of the Northern Circuit. You were engaged in a case at Liverpool. It was an uphill case. The judge and jury were dead against you. The trial had lasted for two days. You had failed to shake the witnesses in the cross-examination. You made no way. The case seemed hopeless. You were horribly irritable, and swore at every one. On the third day you began your speech. You spoke for nearly an hour without apparently producing much effect. Then the foreman asked a question which showed that at length you had staggered the jury. You answered the question. The judge did not like the answer and interposed. You faced the judge and stood by your guns. There was an altercation between you and the Court. It was the crisis of the case. After a hard fight you had got hold of the jury. The judge interfered to take them out of your hand. Would he succeed? That

<sup>1</sup>THE LIFE OF LORD RUSSELL OF KILLOWEN. By R. Barry O'Brien. New York: Longmans, Green and Company, 1901. (viii + 405 pp.).

was the point. You were still arguing with him, when your solicitor, an eminently respectable and even pious-looking man, with a black frock coat, kid gloves, and a white tie — he was solicitor, I believe, for half the county families in the district — rose, and turning round, whispered with great reserve,

note-taking sometimes degenerates into a mere mechanical operation. Russell was taking no note, but he was thoroughly on the alert, glancing about the court, sometimes at the judge, sometimes at the jury, sometimes at the witness or the counsel on the other side. Suddenly he turned to the



SIR CHARLES RUSSELL.

‘Mr. Russell, will you allow me —’ ‘Damn you, sit down,’ said you in a voice quite audible to judge and jury. The effect was electrical. The solicitor sat down. The judge said no more. The jury collapsed. You then blazed away fiercely for another half hour without interruption from any one. The jury returned a verdict without leaving their seats” (p. 3).

Again this: “One day a junior was taking a note in the orthodox fashion, and

junior and said, ‘What are you doing?’ ‘Taking a note,’ was the answer. ‘What the devil do you mean by saying you are taking a note? Why don’t you watch the case?’ he burst out. He had been ‘watching’ the case. Something had happened to make a change of front necessary, and he wheeled his colleagues round almost before they had time to grasp the new situation” (p. 96). Russell would have made a great general.

To an American lawyer the English barrister is always incredible. That an advocate can conduct a trial when others find the facts for him; that a counsel can argue a case when others determine the law for him; that thus the barrister comes to a new case each day with no previous acquaintance with the facts or with the law;—it all seems improbable. And yet this was the way that Charles Russell practiced law. "One day on circuit, a barrister went into the library. He saw a man working up some cases. 'What are you doing?' he asked. 'Working up cases for Russell,' was the answer. He went round the library, and found that there were not less than six men 'working up cases for Russell.' 'Why,' said he, 'the whole library seems to be working for Russell.' 'Yes,' said the sixth man, 'there are six of us doing the work of one man, in order that one man may do the work of six.' It has been said that Russell 'devilled' everything. He certainly reduced 'devilling' to an exact science" (p. 189). He had the wonderful faculty for using the brains and knowledge of others. "When he had confidence in his juniors he would dispense with the authorities. 'I will take your word for it,' he would say" (p. 136).

Here is one instance from many: "He had not read his brief, and had no note. He knew nothing about the business. The solicitor and the parties were in his room waiting for him. I ran across to court just to tell him something of the case on the way back. 'Well, my boy,' said he, 'what is it all about?' I told him shortly: 'An action against an insurance company on a life policy. We are for the company. The defence is that it was a bad life, and that some important facts were not disclosed.' 'What's the point?' 'Well, the point against us is that our doctor passed the life.' By this time we had reached his door. He did not hesitate for a moment; he walked straight in without

further question, sat in his chair, took off his wig, and, looking the master of the whole situation, said: 'Well, gentlemen, isn't this an awkward business about our doctor? Let me see his opinion.' The solicitor rummaged among the papers; the clients were anxious and nervous. Russell read the doctor's opinion, cross-examined everyone, and soon got a grip of the case. But no one could have guessed that he had practically only heard of it about ten minutes before he entered the room."

Once in this way Russell did not reach the court until the luncheon hour. "Then you spied the official reporter of the court. 'Ah!' said you, 'you were there.' 'Yes,' said he, 'but I did not take a very careful note.' He wanted to go to his luncheon, and did not care to be buttonholed by you at that moment. 'Where is your note-book?' said you; and then, without waiting for an answer, you pounced on the note-book which was lying on the desk. 'Here it is: don't go.' Finding that he was in for it, he resigned himself to his fate, saying, 'I'll find the note for you.' 'I have found it,' said you; 'you write very carelessly.' You then read the note, asked him questions, made mems on your brief—which was tied up and quite clean—it was clear that you had never opened it. By the time that you had cross-examined this man, and got out all he knew about the case, the judges returned. 'Are you ready, Mr. Russell?' they asked. 'Yes, my Lords,' said you. You then argued for a couple of hours, turned the court right round, got judgment, and walked out without giving back the man his note-book" (p. 5).

Russell attended to the smallest details in a case; he forgot nothing, he overlooked nothing. Once he was engaged in a breach of promise action. "'The case,' says his devil, 'was a simple one, and practically the question was the amount of damages which the plaintiff

would get. Directly his junior and the solicitor had seated themselves in his room for the consultation, he turned to the latter and asked, 'What is your client going to wear at the trial?' The solicitor replied that he had not the faintest idea. Russell then said, 'Take her to-morrow to her dressmaker, and order a perfectly plain dress of a soft grey colour, fitting closely to the figure, without any trimming, and a big black hat also as simple as possible.' The consultation was very short and the case itself was practically not discussed — indeed there was little to discuss in it. Russell's client got a verdict for £10,000" (p. 109). "'Russell' (says a Northern circuiter) 'differed from all the men on the circuit in this respect; he was a splendid all-round man. Some men were good for legal argument, others were first-rate in commercial cases, others admirable in what are called sensational actions — libel or breach of promise; others came to the front in criminal causes, but Russell excelled in everything. Whatever he went into he came out top'" (p. 111).

Russell in cross-examination excelled all the masters of that art. This biography gives many examples; and most absorbing reading they are. Space can be taken here for three only. Of these three, the first, *Lambri Pasha v. Labouchere*, was at the beginning of his practice at the bar; the second, *Scott v. Sampson*, was in the middle; the third, the Parnell Commission, was toward the end. The increase in his own skill is to be noted in this progression; in the first case the cross-examination of Lambri is by comparison with his later work slight, the witness is tricked, that is all; in the second case, the cross-examination of Sampson shows great power, but no subtlety; in the third case, the cross-examination of Pigott will always be to the legal profession a model — and a marvel.

"Russell once more turned sharply to Lambri and asked in English, 'Is your father alive?'"

"Lambri (in good English): 'Yes.'"

"The Lord Chief Justice: 'We can dispense with the interpreter, I think.'"

"A Juror: 'It would be a great saving of time.'"

"Russell had produced the effect he desired. He had satisfied the judge and the jury that Lambri understood English quite well enough to undergo his examination in that language. The rest of the cross-examination was carried on through the interpreter, but the prejudice created against the prosecutor at the outset remained to the end; and in the end Russell demonstrated to the satisfaction of the judge and jury, and indeed of every one in court, that Lambri was an ill-bred, ill-educated imposter, who had lived on the Continent by card-sharpping, and had come to England to ply the same trade, when Mr. Labouchere, by the help of the French police, brought him to book" (p. 128).

"'Russell's cross-examination of Sampson,' says an eye-witness, 'was ferocious.' I remember one scene which was painful in its dramatic intensity. It lasted only for an instant, but produced an extraordinary effect. Russell asked Sampson a question. Sampson did not answer. 'Did you hear my question?' said Russell in a low voice. 'I did,' said Sampson. 'Did you understand it?' said Russell in a still lower voice. 'I did,' said Sampson. 'Then,' said Russell, raising his voice to its highest pitch, and looking as if he would spring from his place and seize the witness by the throat, 'why have you not answered it? Tell the jury why you have not answered it.' It is impossible to realize the scene unless you saw Russell. The voice, the gesture, the manner, the whole appearance of the man were awful. A thrill of excitement ran through the court. Samp-



son was overwhelmed, and he never pulled himself together again " (p. 148).

"Pigott stepped jauntily into the box and Russell rose. I never saw such a sudden metamorphosis in any man. During the whole week or more he had looked pale, worn, anxious, nervous, distressed. He was impatient, irritable, at times disagreeable. Even at luncheon, half an hour before, he seemed to be thoroughly out of sorts, and gave you the idea rather of a young junior with his first brief than of the most formidable advocate at the bar. Now all was changed. As he stood facing Pigott, he was a picture of calmness, self-possession, strength; there was no sign of impatience or irritability; not a trace of illness, anxiety, or care; a slight tinge of colour lighted up the face, the eyes sparkled, and a pleasant smile played about the mouth. The whole bearing and manner of the man, as he proudly turned his head towards the box, showed courage, resolution, confidence.

"Russell: 'Were you not aware that there were grave charges to be made against Mr. Parnell and the leading members of the Land League?'

"Pigott (positively): 'I was not aware of it until they actually commenced.'

"Russell (again with the Ulster ring): 'What?'

"Pigott (defiantly): 'I was not aware of it until the publication actually commenced.'

"Russell (pausing, and looking straight at the witness): 'Do you swear that?'

"Pigott (aggressively): 'I do.'

"Russell (making a gesture with both hands, and looking towards the Bench): 'Very good, there is no mistake about that.'

"Then there was a pause; Russell placed his hands beneath the shelf in front of him, and drew from it some papers — Pigott, the Attorney-General, the judges, every one in

court looking intently at him the while. There was not a breath, not a movement. I think it was the most dramatic scene in the whole cross-examination, abounding as it did in dramatic scenes. Then, handing Pigott a letter, Russell said calmly:

"'Is that your letter? Do not trouble to read it; tell me if it is your letter.'

"Pigott took the letter, and held it close to his eyes as if reading it.

"Russell (sharply): 'Do not trouble to read it.'

"Russell read it paragraph by paragraph.

"'What do you say to that, Mr. Pigott?'

"Pigott (bewildered): 'I say nothing, except that I am sure I could not have had the letters in my mind when I said that, because I do not think the letters conveyed a sufficiently serious charge to cause me to write in that way.'

"Pigott equivocated.

"Russell: 'What was it?'

"Pigott (helplessly; great beads of perspiration standing out on his forehead and trickling down his face): 'I cannot tell you. I have no idea.'

"Russell: 'It must have been something far more serious than the letters?'

"Pigott (vacantly): 'Far more serious.'

"Russell: 'Can you give my Lords any clue of the most indirect kind to what it was?'

"Pigott (in despair): 'I cannot'' (pp. 135-140).

The next day Pigott fled from London.

Russell had the eloquence of advocacy. The three examples appended here are for the purpose perfect. The first, the plea for Lady Colin Campbell is a noble sentiment. But notice in that appeal for justice, that appeal to the emotions which will overbear all judgment. The second, the vindication of Parnell, is a splendid answer. The United Kingdom rang with it: We are the accusers,

the accused are there." But it made for no settlement of the Irish question. The third, the close to the Behring Commission is consummate. Russell pleads for peace; yet notice that he threatens war.

In the divorce suit of *Campbell v. Campbell*: "I ask for justice, justice, justice, which forbids life or fame to be sacrificed save on evidence at once credible and cogent. Gentlemen, Lady Colin Campbell's life—nay, something dearer than life—is in your hands; and with an earnest heart and with spirit of reverence I would humbly pray that your minds and your judgments be inclined to give in this case a just and honest deliverance" (p. 207).

In the close to the Parnell Commission: "In opening this case I said that we represented the accused. My Lords, I claim leave to say that to-day the positions are reversed. We are the accusers; the accused are there. I hope—I believe—that this inquiry in its present stage has served, and in its future development will serve, more purposes even than the vindication of individuals. It will remove baneful misconceptions as to the character, the actions, the motives, the aims of the Irish people, and of the leaders of the Irish people. It will set earnest minds—thank God there are many earnest and honest minds in this land—thinking for themselves upon this question. It will soften ancient prejudices. It will hasten the day of true union and of real reconciliation between the people of Ireland and the people of Great Britain; and with the advent of that union and reconciliation will be dispelled, and dispelled for ever, the cloud—the weighty cloud—that has long rested on the history of a noble race, and dimmed the glory of a mighty empire" (p. 255).

In the peroration before the Behring Commission: "This arbitration is—who will gainsay it? who can gainsay it?—a victory for

peace. Will your award be a victory for peace? You, gentlemen of this tribunal, alone can answer. It will be, it must be, a victory for peace if, as I cannot permit myself to doubt, it conform to, and leave untouched and undoubted, the principles of that law which has been consecrated by long usage and stamped with the approval of generations of men; that law which has, after all, grown up in response to that cry of humanity heard through all time, a cry sometimes inarticulate, sometimes drowned by the discordant voices of passion, pride, ambition, but still a cry, a prayerful cry, that has gone up through all ages for peace on earth and good-will amongst men" (p. 267).

In his intercourse with men, Russell could be intolerable. "In one consultation, client, junior, solicitor were in attendance at the appointed hour. Russell came in, in wig and gown, sat on his chair, took off his wig, and then turning to the solicitor said, without any preliminary remark whatever, 'Well, Mr. A., I have read every word of your brief, and there is neither sense, fact, nor law in it from beginning to end'" (p. 106). A pompous "expert" who had been in the habit of laying down the law before Parliamentary committees, once attended a consultation at Russell's chambers. "'Gentlemen,' said he, while Russell was engaged in conversation with the other counsel, 'If you will allow me, I shall give you my view of this case——' 'Hold your tongue,' said Russell, 'till you are asked for your view'" (p. 107). "One day in court the lay client in a case turned round and made some suggestion to Russell. 'Who is that unpleasant-looking man who spoke to me?' said Russell with a frown to the solicitor, who happened to be sitting by the side of the client. 'That's your client,' said the solicitor. 'Then I must trouble you,' said Russell, 'to ask him to go to some part of the court where I can-

not see him'" (p. 108). "One judge remarked: 'We cannot listen to irrelevant matter.' Russell replied: 'What may appear to you now irrelevant matter may turn out very relevant by and by'" (p. 15). "'It is a pity,' said some one, 'that Russell is not a little more tolerant of the judge'" (p. 103). After so many incidents of this sort, this story gives us comfort: In Manchester once Russell called a cab. The cabman was a powerful man in build. Russell scanned him: "'Why,' he said, 'a big fellow like you ought not to be driving a cab.' 'What the hell is it to you,' said the cabman, 'what I do? get into the cab and mind your own business'" (p. 205).

Perhaps the strangest thing about Russell was that although an Irishman he had no sense of humor whatsoever. He never employed even irony. He was a grim man in battle. Only one instance is recorded; and that incident shows Russell as a man using

a new weapon. A friend repeated the verse to him, old now:

"There was a young lady of Riga  
Who smilingly rode on a tiger;  
They returned from the ride with the lady  
inside  
And the smile on the face of the tiger."

"He did not seem at all amused at the time, but next day told me that he had used it with excellent effect in a speech at a meeting, as an illustration of the political situation, the tiger being the Conservative party, and the Liberal-Unionists being represented by the young lady" (p. 344).

What Lord Bowen said of Lord Russell was said with discrimination,—Russell might not know the facts, Russell might not know the law,—but he could argue any point of law or fact better than any other man. It was as advocate that Lord Russell was greatest. It was Charles Russell, barrister, that achieved the highest eminence in his time.

## GHOSTS IN COURT.

BY M. E. E. KERR.

THERE are several cases on record in which dumb animals had been indicted with due formality, regularly tried and convicted, and solemnly executed. But our strenuous forefathers did not confine their attentions and juridic deliberations to men and animals. They journeyed into the mystic realms of the supernatural, and actually put venturesome ghosts upon trial for their ill-behavior.

The solemn Glanville<sup>1</sup> gravely records the ghostly gambols and frolics in the ancient Hurstmonceaux House, and introduces, with plenary evidence, a minute narrative of "the Demon of Tedworthy," whose invisible

drum beat in the aforesaid mansion-house every night for about a year, for the delectation of some reverend magistrate, who had manifestly raised a spirit he could not lay, and whose frisks and antics woefully deranged the whole unsuspecting family. This account of the prank nocturnal visitant, confirmed by affidavits, though shaken by demurrers, was long a leading article of faith with all good and pious people, and was finally immortalized by the inimitable Joseph Addison in his comedy entitled "The Drummer, or the Haunted House," and the "ghost" was finally "laid" by "an old man with a grey beard, in a black cloak," who passed for a "conjurer."<sup>2</sup>

<sup>1</sup> See his "Saddicismus Triumphatus," published in 1668, precious copies of which are still met with on rare occasions.

<sup>2</sup> Addison's Works (Hurd's ed.), Vol. V., p. 141 *et seq.*

**GREAT LAWYERS, AND HOW THEY WON.<sup>1</sup>**

BY WILLIAM G. PECKHAM.

**I**T has been my good fortune to know some of the leaders of our bar and that is why I presume to try to pay the debt of your hospitality by telling you what I know of those leaders. It is a great pleasure to be of use to young men. New York is a centre for commerce and for the business of other States and other countries, but more yet it is a centre where litigated matters are brought into court. To New York come the champions at the bar of other States and other countries. Three Presidents of the United States have been members of our city bar within about ten years. Here also settled Evarts and Choate from New England, O'Connor of Irish birth, Robert Ingersoll from Illinois, Governor Hoadley from Ohio, Secretary Carlisle from Kentucky, Prior from Virginia, the Van Wycks from North Carolina, and a thousand others of greater or lesser degree and from all parts. The competition has been of the keenest and the ability required for success of the highest. Eloquence has become common, especially in our brethren from the South and from Ireland, but perhaps it is less valued, if not combined with other gifts, in a town where the judges have little time. The business quality is far more valuable to the successful lawyer of to-day. Industry is more valuable. A conspicuous integrity is a still better asset. I think our leaders have been men who combined all these qualities with a large humanity.

Charles O'Connor was the leader of this bar thirty years ago, and he was the last of the old school. He was a beautiful figure,

<sup>1</sup> An address before the New York Phi Delta Phi Club, November 11, 1901.

full of emotional power, like a fine sort of Irish Galahad.

Mr. O'Connor once gave in his incisive way a useful hint to all lawyers: "Cross-examination is an amusement indulged in by the very young. It is like trying to pull the tiger out of his den. You may pull him out, or again he may pull you in." Mr. O'Connor did effective work for good government and for elevating the character of bench and bar.

Next came Mr. Evarts. His great legal contests were the International Arbitration at Geneva, where, as chief, he won \$17,000,000 in damages, the Hayes-Tilden electoral contest, the Andrew Johnson impeachment trial, where he was at his greatest, intellectually, the Vanderbilt will case, which he closed out at short notice, and the Beecher-Tilton litigation. He won them all. Mr. Evarts had a fine, old-fashioned dignity and elevation of character, and high power in national and international law. From time to time the selection of the judges of the United States court rested with Mr. Evarts. His choice was always for judges of the highest old-fashioned quality.

Then came the younger Choate, who has stood as our belted champion against all comers for twenty years. He has tried and won more litigations involving large amounts than any lawyer of history,—for Webster and the elder Choate tried some small country matters all their days and never had litigations involving such large pecuniary matters.

Joseph H. Choate's winning record in all multi-millionaire will-cases is a sample. It needs a book to tell of all. In the court or at the Cooper Union, while he has always

been a little finer and a little keener than judge or jury or audience, yet he always got into the jury box. It is pleasant to hear the East-Side, foreign-born citizens clamor for him in reform meetings. It is a comfort to hear him in after-dinner speeches. His wit is of the best, and there has been so much of it that it cannot be recounted on an occasion like this. Other men have been above or below the forum; others have been strange or portentous, but he has always been just the height of the heart of the judge and the jury. Where in history has a lawyer tried and won so many cases of such magnitude? With a jury, perhaps Colonel James was his best successor among those who are now dead. All of these men who led were largely gifted, physically as well as mentally. I do not forget Mr. Parsons and the chief of my name, Wheeler H. Peckham, but they are living, and, I hope, will long live to add fame to our bar.

The Lord Protector's Chancellor took for his posey the motto: "The name of serjeant-at-law was the name of a gentleman." Be sure that is a prime quality of all the leaders of the first rank. It is better for a man to hang a millstone around his neck than to disparage old age or womanhood at our bar. You know how a roystering parson sued a man in King Alfred's time, because the other man called him, in the mixed language of those times, *un grand fou*, which in modern language would be a — fool. The court used up a portion of the leisure of those days in settling the law for all time, and said that the parson would not recover because he had not shown special damage to his business, and added significantly: *d'un attorney aliter*. Still, to-day, an attorney should be free from that qualification.

Besides the conspicuous leaders, many lawyers live and die unknown to fame, men of admirable talent, men of honor, trusted as completely by their clients as the confessor

is trusted by the penitent. Their wars are matters mooted in books and in precedents of conveyancing. Their lines of battle are upon parchment, their successes are in unquestioned titles and undisputed wills. Their credit with all good men is unbounded. With these men lies all hope of the future for bench and bar. In other States and other countries the leaders of the bar are elevated to the bench.

Three perfect forums have I seen: One was where the Lord Chief Justice of England, Baron Russell, sat, with his snuff-box and with his red bandanna handkerchief, in the serenity that comes from the knowledge in all men that the judge is the ablest by birth and by learning, and as far above politics or pull or prejudice as are the heavens. The other was where Grover Cleveland sat as trial referee, with a physical, mental, and moral weight that made McGregor's seat the head of the table. Exception, objection, and disquiet, and the anticipation of appeal were absent from both of these trial forums. The particulars as to my third ideal forum I reserve for another occasion.

From this table some years ago Mr. Justice Patterson severely criticised the bar. We plead *non vult*. There are reasons, partly of policy and partly of politeness, for this plea. But consider what the chosen leaders of the bar can offer of their choice to strengthen the bench. There will be interest in this query, if not to-day, then to-morrow. Roosevelts and Jeromes will now develop in every State, and will be numerous in our city. We are a proud people, and, above all, we crave the supremest quality in the material for our bench. We want more like Mr. Justice Patterson. We say that the way to give us more of the same is, in one way or another, directly or indirectly, to make the choice of judges from the choice of the bar and not of the politicians.

## COUNSELLOR McCANN.

BY C. B. PALMER.

THE counsellor, Andrew Jackson McCann,  
Was in many respects a remarkable man ;  
A rich tone of voice, without stop or stammer,  
(The writer can't strictly vouch for his grammar),  
Quick-witted, astute, with unlimited gall ;  
Of wide local repute and admired of all.

Now it seems Andrew Jackson was always at odds  
With a brother attorney whose last name was Dodds :  
In all legal tilts and forensic display,  
The one got the best who had the last say,  
Till the great local action, remembered e'en now,  
Of Pitts *versus* Fowler, concerning a cow.

Squire Perkins of Podunk had slept in his chair,  
With small knowledge of law but a judicial air ;  
Had made all his rulings, the case had been closed ;  
The constable roused up each juror that dozed ;  
The court room was crowded, from far and from near,  
To listen to "sum up," the verdict to hear.

The justice had charged, as his final act,  
"The jury were judges of law and of fact " ;  
Then Counsellor Dodds began a great plea,—  
He covered all subjects in earning his fee,  
And ended by saying, "He was proud of event  
Of meeting a lawyer who was greater than Kent."

'T was then Andrew Jackson rose in his place ;  
He bowed to the court, and the jury did face :  
"Your Honor and gentlemen, I once went to school  
In the old district school-house, and there learned the rule  
That all parts of speech are made up of three,  
And when I illustrate with this you'll agree."

Then turning to Perkins with a wink of the eye,  
"That your Honor 's the Person no one will deny."  
Then glanced round the room, and each corner did trace  
With finger : "And, gentlemen, this is the Place."  
Then raising his voice till the rafters did ring,  
He pointed at Dodds : "There! there! is the Thing!"

## AN ANALYSIS OF THE HOLMES CASE.

BY JUDGE ARNOLD.<sup>1</sup>

THE article on the report of the trial of Herman W. Mudgett, *alias* H. H. Holmes, by H. Gerald Chapin, entitled "A Study in the Fine Art of Murder" and published in THE GREEN BAG for November, 1901, is a philosophic treatment of the trial as published with entire fullness by George T. Bisel, Philadelphia. There are some matters connected with the murder and trial which do not appear on the surface of the report, some which may be read "between the lines" by those who took part in the trial, and some matters which require explanation.

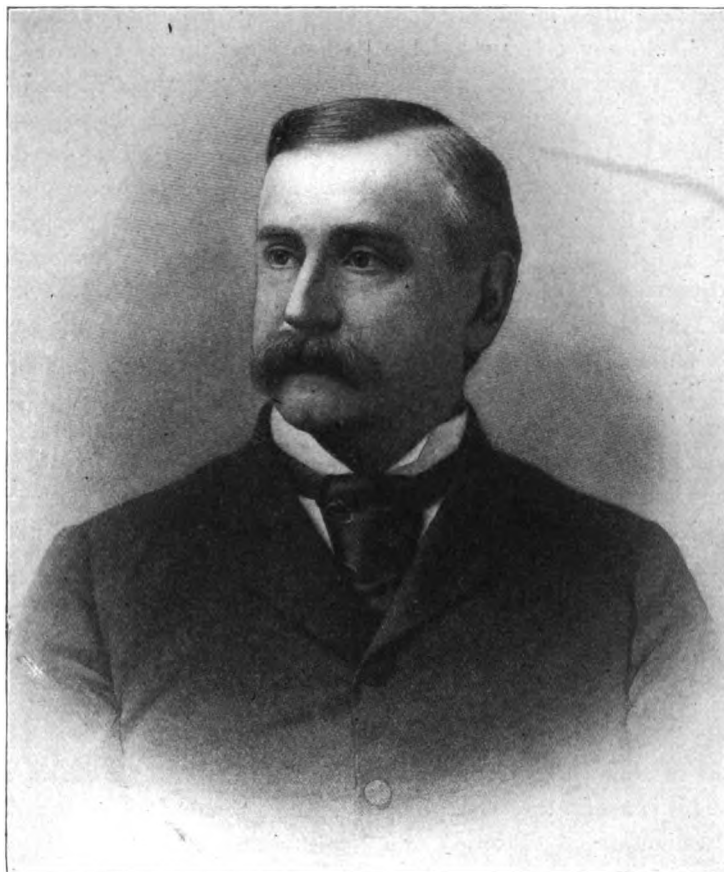
The first matter which should be considered is the effort made on behalf of the prisoner to obtain a continuance or postponement of the trial and to create sympathy for the prisoner in case of refusal. The prisoner was arraigned on September 23, 1895, and October 28, 1895 (five weeks afterwards), was fixed as the date of the trial. On that day witnesses were present from Massachusetts, Indiana, Colorado, Texas, Canada and other places. If the trial were postponed it would have been difficult to get the witnesses again. Prisoner's counsel gave as a reason for a continuance that the time allowed for preparation was hopelessly short and inadequate, that three murder cases were to be tried in one case, that the defendant's

financial affairs were in such a condition as to make it impossible to gather witnesses, and that they had come to the determination that they could not consistently proceed with the case much under sixty days from that time. The District Attorney opposed a continuance, stating that many of the witnesses had been brought from far distant States, that they came voluntarily, that he could not compel their attendance, that he was quite sure he would never be able to get them here again, and that the condition of the widow of the deceased was such that it was absolutely perilous to permit the case to go over. The motion for a continuance was overruled. Then the prisoner's counsel made a dramatic attempt to delay the trial by withdrawing from it, and were checked by a ruling which caused much discussion by lawyers and newspaper writers throughout the country, although it can be sustained upon principle and supported by the authority of the highest courts in the country. That ruling was: "Counsel in a case like this have no right to withdraw. You have no right to withdraw at the very beginning of the trial. Your duty is to remain. Of course I cannot force you to stay and do your duty. The remedy of the court is, if counsel withdraw on the eve of a murder trial without consent, to enter a rule on them to show cause why they should not be disbarred." As before said, this ruling is supported by the authority of the highest courts of this country. Some of them are cited in *Weeks on Attorneys*, Section 255. It is also sustainable upon principle. All withdrawals of counsel are by leave of court, which is always given when ample time is allowed to the prisoner to get other

<sup>1</sup> Hon. Michael Arnold has served twenty years as judge of the Court of Common Pleas as well as of the Criminal Courts of Philadelphia. He has presided at the trial of more than one hundred murder cases, and is considered one of the ablest judges in the State of Pennsylvania. He is a man of great practical ability and is the father of several important Acts of the Legislature by which ancient rules both of substantive law and of practice have been abolished to make way for new laws drawn in conformity with the demands of modern ideas. He is, to use his own words in an opinion in the case of *Downey v. Traction Co.*, 3 Dist. Repts. (Pa.) 81, an advocate of "The triumph of common sense over unreasonable authority." — *The Editor*.

counsel. It would be unjust to the prisoner as well as to his counsel, to hold them together when they are out of harmony with each other. But there is a time to withdraw and a time to remain. To withdraw without

retained to defend a young Swiss valet named Courvoisier, charged with the murder of his master, Lord William Russell. The defence was a denial of the charge, and there was an insinuation that one of the female



*Michael Arnold.*

the consent of the prisoner on the very eve of the trial, would be to abandon him to fate. It would be such an atrocious act of desertion as no court would permit. A reference to a celebrated case, which was tried in London in 1840, shows the opinion of a very distinguished English judge on this subject. Charles Phillips, a prominent barrister, was

retained to defend a young Swiss valet named Courvoisier, charged with the murder of his master, Lord William Russell. The defence was a denial of the charge, and there was an insinuation that one of the female servants of Lord Russell had committed the murder. On the second day of the trial Courvoisier sent for his counsel and said to them : " I have sent for you gentlemen to tell you I committed the murder." Mr. Phillips, in a correspondence written in 1849, and published in the London *Times*, wrote of this confession : " When I could speak, which was



not immediately, I said : 'Of course then you are going to plead guilty?' 'No sir,' was the reply. 'I expect you to defend me to the utmost.' We returned to our seats. My position at this moment was, I believe, without parallel in the annals of the profession. I, at once, came to the resolution of abandoning the case, and so I told my colleague. He strongly and urgently remonstrated against it, but in vain. At last he suggested our obtaining the opinion of a learned judge, who was not trying the case, upon what he considered to be the professional etiquette under circumstances so embarrassing. In this I very willingly acquiesced. We obtained an interview and Mr. Baron Parke requested to know distinctly whether the prisoner insisted on my defending him, and on hearing that he did, said I was bound to do so, and to use all fair arguments arising on the evidence." Chief Justice Sharswood, in his valuable book on Legal Ethics, gives all the correspondence and lends the weight of his opinion in favor of Mr. Phillips' action in that case. After an attorney has entered his name on the record, he cannot withdraw without leave of the court : Taney, C. J., in *United States v. Curry*, 6 Howard, U. S. Rep. 106.

After the effort of counsel for Holmes to withdraw without his consent, they took their seats and the examination of talesmen was commenced to determine their competency to serve as jurors. When the first talesman was turned over to the defence for cross-examination, the prisoner arose and said : "May it please the Court, I have no intention to ask Mr. Rotan and Mr. Shoemaker to continue in this case when I can see that it is against their own interest, and, bearing that fact in mind, I ask to discharge them from the case. These gentlemen have stood by me during the last year, and I cannot ask them at this time to stay in the trial of the case when it is against their interest."

After some more discussion, in which the prisoner and his counsel said they would like a continuance for one day so that they could get other counsel, they agreed to remain in the case and give the prisoner until the next day to secure other counsel. Counsel then proceeded to cross-examine the talesman, when one of the counsel arose and said : "May it please the Court, the defendant in this case says that he intends to examine these witnesses (talesmen), that he does not want us to interfere with the examination of them, and that that is what he is going to do." Then they retired. The examination of the talesmen went on for a time when Mr. Moon, a prominent member of the bar, came into the court-room and held a consultation with the prisoner for more than fifteen minutes (the trial being delayed meanwhile) when he addressed the judge in these words : "In response to a request of the prisoner, I have come here, and, after a brief consultation with him, I would say that of course it is impossible for me to take charge of this case. I, perhaps, know as much as any other counsel could know about the case. And I would say that practically I have not been consulted in this matter, although efforts have been made to retain me, but for reasons I have not accepted a retainer. I have declined to take part in the case and the position in which I find myself now, no matter how earnestly I might desire to aid this man, in view of the preparation of the case, which covers affairs and transactions which I have not had the opportunity to examine or investigate at all, no matter how earnestly I might desire to serve the prisoner and however willing I might be to lay aside my own professional engagements, I feel that in the absence of preparation I should be utterly powerless to aid the prisoner. Therefore, I must decline and I am frank to say so to the Court."

The reply was :

"The Court. The prisoner has exercised his right ; he has discharged his counsel and is conducting his own case."

The effect of Mr. Moon's consultation with the prisoner before the jury and his refusal to take part in the trial, and especially his statement that "perhaps he knew as much as any other counsel could know about the case" may be imagined. I will not repeat the rumors about the prisoner and who were his counsel, but I will state an undoubted fact, that after his ostensible counsel were discharged and retired, they were in consultation with him during every recess of the court and in the morning before the opening of court. After the jurors were selected and sworn a recess was had until three o'clock, when the District Attorney made his opening address and court was then adjourned, at the request of the prisoner, until the next morning. Other counsel were then assigned to the prisoner, but he rejected their services. On the evening of the second day his counsel who had been discharged previously, returned and took part in the trial until the conclusion of it. In deciding against granting a new trial I said : "The Constitution of Pennsylvania as well as of the United States secures to persons accused the right to have counsel to assist them at their trial, but it does not attempt to force counsel upon them. The right of every man to plead his own cause is a natural, inherent right. The right to have counsel is given by the Constitution, and no man can be deprived of the right to defend himself or be compelled to have the services of counsel. The Constitution also secures to the defendant the right to a speedy public trial. This was given in return for the right which the Commonwealth possesses to a like speedy public trial, and it is not within the power of persons accused to say when they will be willing to be tried or to defeat a trial by dilatory motions and

practices such as were resorted to in this case." *Comm. v. Mudgett*, 174 Pa. 239. The court cannot force counsel on an accused person : *State v. Moore*, 121 Missouri 574.

The next matter to be considered is the time taken to select the jury and the questions allowed to be put to talesmen. The jury in the Holmes case was selected in about three hours, the time usually required for that purpose in this State. The questions allowable are only two in the main, but they may, however, be divided into more, according to the answers given by the talesman. They are : "Have you formed or expressed any opinion as to the guilt or innocence of the prisoner ?" and, "Have you any conscientious scruples on the subject of capital punishment ?" If the talesman answers that he has formed an opinion, then he is asked whether that opinion is so strong as to influence him in finding a verdict and whether he can lay aside his opinion and render a verdict on the evidence which he will hear in court without regard to his opinion. If he says he will be governed by the evidence alone without regard to his opinion, he will be accepted as a juror. *Comm. v. Crossmire*, 156 Pa. 304, is the last of a long line of cases on this point.

There are in Pennsylvania a number of persons of religious views who call themselves Friends, while the general public call them Quakers. One of their tenets is opposition to war and to the death penalty. They say they have conscientious scruples against capital punishment and would not agree in finding a verdict which would result in that kind of punishment. They are never accepted as jurors. There are a number of other persons who are not Friends or Quakers, who, in order to evade jury duty, say they are conscientiously opposed to capital punishment. Of course they are prevaricators, but we have to take them at their word and declare them unfit for jury duty.

No questions are allowed to be asked of talesmen as to their religion, politics, social relationships as Masons, Odd Fellows and the like, or the degree of proof which they would require. Consequently it takes not more than five to ten minutes to examine each talesman, and the jury is usually selected in from two to three hours.

I come now to the important matter in regard to the trial, and that is the guilt of the prisoner. The allegation of the District Attorney was, that Pitezel was killed on Sunday morning, September 2, 1894, by chloroform poisoning. His body was found on Tuesday morning, September 4, on the second floor of the house which he alone occupied, but the surrounding conditions showed that he died on the third floor, and was dragged down after death to the second floor. The belief of the District Attorney was that Pitezel was drunk when Holmes chloroformed him, but this was not proved until Holmes, by questions which he put to the coroner's physician, convinced every one that Pitezel was drunk at the time. When the body was found partial decomposition had taken place. The clothing and part of the skin was burned. Alongside the body was a broken quart bottle which emitted the odor of benzine. The broken pieces of the bottle were on the *inside* of it, instead of being scattered on the floor as they would have been if the bottle had been exploded instead of collapsed, and the ashes of burned paper were on the cork. There was a corncob pipe full of tobacco not used and a burned match stick alongside the body. All this was done to make it appear that Pitezel was *accidentally* killed by an explosion. The coroner's physician said the cause of death was chloroform poisoning, that he found a quantity of chloroform in the stomach of the deceased, and that it was put in after death, as the stomach was not irritated and there was no inflammation or con-

gestion of the œsophagus as there would have been if chloroform had been injected during life. How the chloroform was put into the stomach was shown by Holmes' examination of the coroner's physician. Holmes' questions were based on his knowledge of the manner in which the chloroform was injected, and convinced every one who heard the questions, that he was proving those facts which Holmes knew and the District Attorney believed to be the facts, but which he could not prove. For instance, Holmes was inquiring of the physician the various ways of getting chloroform into the stomach, and put this question :

"I am very particular for your answer on this point . . . Was there anything in the condition of the stomach at the time you made your examination to preclude the possibility, at least, of the chloroform that you found there at that time having entered by *dropping into the mouth* and passing down through the throat or œsophagus into the stomach ?

"Answer. Such could have been the case before *rigor mortis* had taken place.

"Cross-Question. Is it possible if the mouth had been filled at the time of death *or within an hour or two*, that it could have passed down into the stomach ?

"Answer. There is such a possibility."

These questions and answers convinced every one that Pitezel had not swallowed the chloroform and thus killed himself, but that it was put into his stomach after death.

The next matter of inquiry was the condition of Pitezel immediately before his death. Was he drunk, and therefore in a condition to be stealthily killed by chloroform ? This matter was settled by Holmes' questions to the coroner's physician. There was evidence that Pitezel had bought a pint of whiskey on the Saturday night before the Sunday on which he was supposed to have been killed,

but there was no evidence as to the time he used it. Holmes asked the physician :—

“Question. Was there any trace of liquor, by which I mean anything in the way of any kind of stimulants in the stomach ?

“Answer. It did not show it, because the odor of chloroform was more prominent than any liquor could be, and the quantity is too small for that.

“Question. If this man had taken into his stomach within an hour prior to his death, a wine-glass full of liquor . . . would it not have been in the stomach at that time—certain traces of it ?

“Answer. Well, it diffuses very rapidly in the stomach.”

It is to be remembered that the doctor's examination of the body was made two days after the death and that decomposition had already set in. But that Pitezel was drunk and therefore easily to be chloroformed was shown by Holmes' further questions :

“Question. From the condition of the stomach and other organs, are you prepared to say, that at the time this man died he was not in an insensible condition from drink ; say one-half hour before his death ?

“Answer. No. There was not enough liquor in his stomach to cause alcoholism or alcoholic poison.

“Question. I wish to repeat that question. From the conditions you found in this body, in his stomach or other organs, are you prepared to give a professional opinion to the effect that one-half hour before he died or at the time of his death, he was not in an insensible condition from the excessive use of alcohol ?

“Answer. I can say truthfully his stomach did not so indicate.”

These questions and the emphatic manner in which they were put and repeated convinced every one who heard them that Pitezel was drunk on Sunday morning, September 2,

when Holmes went to his house, and that Holmes then killed Pitezel with chloroform. Holmes had been partially educated as a physician, but did not graduate. He knew about poisons, he had kept a drug store, he could write prescriptions, and the belief was that when he found Pitezel drunk, he went out and procured the chloroform.

Pitezel's life was insured in the Fidelity Mutual Life Association of Philadelphia for \$10,000. Holmes was paying the premiums which were becoming burdensome. If he could get rid of Pitezel by an apparently accidental death, the insurance money could be collected. Hence the motive for killing Pitezel.

It will be noticed that Holmes examined the coroner's physician. This was done before his counsel returned to take part in the trial, although in the meantime they were advising him during the recesses of the court.

Miss Yoke (Holmes' third wife, so called), was examined when Holmes' counsel were present, but at his request he was allowed to cross-examine her. There was evidence that he had three wives living, so that Miss Yoke, not being a lawful wife, was allowed to testify against him. As before said, the murder was perpetrated on Sunday, September 2, 1894. He asked Miss Yoke :—

“Question. You have said I left the house . . . at about half-past ten or eleven—between ten and eleven o'clock on Sunday morning, September 2.

“Answer. I have.

“Question. When did you next see me ?

“Answer. I have said that I believe between three and four o'clock.

“Question. Describe as nearly as you can the condition in which I then appeared when I returned to the house—I mean physically ?

“Answer. You came in hurriedly and said that it was very warm, that you had been walking very fast, and if I was well enough

we would leave that evening, since I had partially packed my trunk and had expected to go.

"Question. Had you ever seen me in a more nervous and prostrated condition than upon that day? . . . Was my appearance not such that it would be readily seen by any one, and was it not readily seen by you, that I had been probably much excited during my absence?"

"Answer. I thought you had been very much hurried and somewhat worried.

"Question. As to the condition of my clothing on that day, you had occasion before we left that evening to see the condition in which the suit I wore was on that day, packing it in the trunk, had you not?"

"Answer. I don't know whether I put the suit in the trunk or not. You had spoken of your underwear being damp from perspiration.

"Question. And my underclothing in the same condition?"

"Answer. Yes, sir."

This testimony showed that Holmes, when he came away from Pitezel's house on the day of the murder, was, as he called it, nervous and prostrated, and excited during his absence from his place of sojourn (a boarding house about two miles from the place of the murder) and as Miss Yoke said, hurried and worried, just as a person would likely be after committing a murder. The cross-examination of Miss Yoke also developed the fact that when Holmes left Miss Yoke in the morning of the day of the murder they had not fixed upon a time when they were to leave the city, yet as soon as Holmes got back to his residence he told Miss Yoke that they would leave that evening. This was evidence of flight immediately after the perpetration of the murder and had its weight with the jury.

On the assumption that Pitezel had not

committed suicide, the insurance company paid the insurance money, ten thousand dollars, on September 24. Part of the money was retained by a western State lawyer, but the greater portion of it was received by Holmes, who thereupon became interested in removing the widow and children of Pitezel as claimants of the money. Evidence had been given that Holmes had tried to kill Mrs. Pitezel by an explosion of dynamite in Burlington, Vermont. The District Attorney then offered to prove that Holmes killed the minor son of Pitezel at Irvington near Indianapolis, and two of his minor daughters in Toronto, Canada, to show the motive for the murder. This offer was admissible under the decisions of the Supreme Court; *Goerson v. The Commonwealth*, 97 Pa. 388, and 106 Pa. 477; but it was rejected, as I did not deem it wise to complicate the trial with the details of four murders when there was sufficient evidence of one, especially as the prisoner could have been tried in the other jurisdictions where he had committed the offences charged to him, if he escaped conviction here.

How was the crime detected? How were the facts discovered? Holmes was a stealthy murderer. He killed his victims by means of poison, and when suspicion was diverted he would talk about the persons whom he killed. Holmes was arrested in Boston on a charge of conspiracy to cheat and defraud the insurance company. He was wanted at the same time in Texas for horse stealing, but he preferred to come to Philadelphia without a requisition. It was his talk after his arrest that led the officers of the insurance company to suspect that Pitezel had been murdered. Pitezel went under the name of Perry, and an inquiry was started to determine whether Perry was Pitezel. The body was dug up on September 22, 1894, and identified as Pitezel. While in prison Holmes wrote a book called "Holmes' Own Story," which

described the finding of Pitezel's body and was intended to lead the reader to believe that Pitezel was accidentally killed or committed suicide. It contained much information which gave the detectives clues which they ran out and thus unravelled the case. Holmes also talked to the detectives and told one of them that he had dragged Pitezel's body from the third to the second floor of his house after he was dead. The inquiry on this would naturally be—why did he do it? It may be truly said that Holmes convicted himself. He did not go upon the witness stand, and no evidence was offered in his behalf.

After his conviction Holmes wrote and sold to a newspaper combination (it is said for \$7,500) a confession in which he said he had killed twenty-seven persons, but this was vain boasting. It is believed that he killed at least six,—that is, Pitezel and three of his children, and two girls named Williams, with whom he was intimate, and who were never heard of after they lived with him. On the

scaffold he denied that he had killed Pitezel, so that he died as he lived, a murderer and a liar. He was of good personal appearance and manner, and neat and tidy in his dress. He was called "smart" by some persons, but he caused his conviction by his talk before and after his arrest, by the book he published while in prison, and by the questions he put to the witnesses, which questions convinced every one who heard him that he knew the facts to be just as his questions were intended to elicit.

The trial was commenced on Monday, October 28, 1895, and was concluded on Saturday night, November 2, shortly after eight o'clock. Two sessions of the court were held daily, from ten to one and from two to six o'clock, and on two nights from seven to ten o'clock. The trial was conducted with entire propriety and great care for the interests of the prisoner as well as of the Commonwealth, and the verdict of guilty of murder of the first degree was right and just.

Holmes was hanged on May 7, 1896.

---

## THE BLACK MARIA.

BY JOHN DE MORGAN.

THE repulsive, hearse-like wagon used in England for the conveyance of prisoners is universally known as the "Black Maria."

There is a degradation in being carried to court, or to a police cell, in this wagon which is positively cruel, because even those arrested on suspicion as well as the most hardened and vicious have to use it. Most of the Black Marias are constructed like a furniture wagon, but have small cells, in which it is impossible to sit down, on either side of a centre aisle. In this aisle sits a court officer, policeman or deputy warden of the prison.

In 1867 Colonel Kelly and Captain Deasy,

two Irish-Americans suspected of Fenianism, were being conveyed to prison in a Black Maria, in the city of Manchester, when they were rescued by a mob of Irishmen. In the turmoil the police-sergeant sitting in the Black Maria was accidentally killed. Three men, Allen, Larkin and O'Brien, were hanged for the death of Sergeant Brett, another, Edward O'Meara Condon, was reprieved and eventually liberated, though he too had been sentenced to death, and a fifth, also convicted of the capital offence, was proved to be entirely innocent of any participation in the rescue.

The Black Maria has a very interesting history, for in that very prison wagon some of the Chartist prisoners had ridden to prison, their crime being love of freedom.

The origin of the name is not so well known as the history of the wagon.

The term originated in this country. When New England was filling with immigrants from the old country, a negress, named Maria Lee, kept a sailors' boarding house in

Boston. She was a woman of Amazonian strength and helped the authorities to keep the peace. Frequently the constables invoked her aid, and the saying "Send for Black Maria" came to mean "Take him to prison." The sailors returning to England frequently used the phrase, and so in the course of time the name of Maria Lee, shortened and altered to Black Maria, became the name of the prison carriage, and has remained so until this day.

## CASES FROM THE OLD ENGLISH LAW REPORTS.

### III.

By MAX A. ROBERTSON.

#### CONTRACTS IMPOSSIBLE OF PERFORMANCE.<sup>1</sup>

WE have nothing to indicate the respective callings of the parties to this case, nor the motives which led them to enter into the peculiar contract which it was admitted they did enter into. Both parties may have thought that he was driving a good bargain, and that he had got the better of the other. Certain it is that the defendant had not studied the arithmetical progression. No man would willingly agree to supply 524,288,000 quarters of rye for the sum of five pounds, even on the terms that two-sixths of that sum should be paid before the commencement of the delivery. But one would like to know whether the plaintiff realized, when he made the bargain, that he was entitled, on the strict construction of the contract, to an amount of grain which would certainly have taxed the agricultural resources of England, even if the defendant's counsel was not wholly justified in asserting that there was not so much rye in the whole world.

But while we are left to speculate on the

motives and attending circumstances that led to the formation of the contract, its terms happily preserved in all their specious simplicity and apparent innocence. For the magnificent sum of half a crown in hand, paid, Whitacre agreed to deliver to Thornborow 2 grains of rye corn on Monday the 29th of March, 4 grains on the Monday next following, 8 grains on the subsequent Monday "*et progressu sic deliberaret quolibet alio die Lunae successive infra unum annum ab eodem 29 Martii bis tot grana secalis quot die Lunae proximo praecedente respective deliberanda forent.*" The balance of the purchase money, amounting to four pounds, seventeen shillings and sixpence, was to be paid—mark the plaintiff's caution—on the completion of the contract by the defendant. Such were the terms to which the parties bound themselves, and to an uneducated farmer, in the early years of Anne, we can imagine they appeared tempting.

With the characteristic brevity of the old time reporter, Lord Raymond does not vouchsafe any information as to the perform-

<sup>1</sup> Thornborow v. Whitacre; 2 Ld. Raym., 1164 (1705).

ance of the contract. We can, however, picture simple-minded Whitacre producing, with a smile of satisfaction at the thought of his large profit, two grains of rye corn from the remote corners of his wallet. We can see the wallet gradually swelling on each successive Monday, till at last it is displaced by a sack. We conjecture that it was about the time when he required assistance to deliver his weekly instalment that the defendant committed that breach of the agreement which led Thornborow to bring his action.

To the declaration the defendant demurred, and the dissension was argued before Holt, C. J. It was then contended that contract was void on the ground of impossibility, which was divided into three classes: *legis*, *rei*, and *facti*. In the course of the argument the case was instanced of a relief payable by law to a landlord, immediately on the death of the tenant, yet if the relief be a rose or a bushel of roses, and the payment fell due in the winter time, the landlord might not distrain till the summer; for the "Law takes notice that roses cannot be kept, but otherwise of wheat, etc., which may." A difference is also asserted in a covenant to hand over in as good a condition as at the beginning of the lease between a wood and a house, where they have suffered from a violent gale.

Holt, C. J., however, intimated in the course of the argument, that "where a man will, for a valuable consideration, undertake to do an impossible thing, though it cannot be performed, yet he shall answer damages." He also appeared prepared to hold that in the present case the performance was only impossible with respect to the defendant's ability, which was not such an impossibility as to void the contract. Moreover, he considered that the words, "*quolibet alio die Lunae*" were to be considered as meaning

every other Monday, which would materially reduce the impossibility.

During the argument the case of *James v. Morgan*, 1663, was referred to, of which the following is the complete report<sup>1</sup>: "*Assumpsit* to pay for a horse a barley corn a nail, doubling it every nail; and avers that there were thirty-two nails in the shoes of the horse, which being doubled every nail, came to five hundred quarters of barley; and as *non assumpsit* pleaded, the cause being tried before Hyde at Hereford, he directed the jury to give the value of the horse in damages, by eight pounds, and so they did; and 'twas afterwards moved in arrest of judgment for a small fault in the declaration which was over-ruled, and judgment given for the plaintiff." From which, incidentally, we gather either that the method of shoeing horses has altered, or that the horse in question had some peculiarity of formation in his hoof which necessitated an extra nail in each shoe above the number now commonly used.

After a vain attempt to distinguish this case, the defendant's counsel appears to have lost heart, for he, perceiving the opinion of the court to be against his client, offered the plaintiff his half-crown and his cost, which was accepted of, and so no judgment was given in the case.

Thornborow, like many others, was before his day. As a speculator in wheat at the present time, he would probably have amassed a huge fortune. Think of it! The world's crop of rye for a five pound note. What a magnificent corner it would have been. Lord Raymond states that thirty instalments would have amounted to one hundred and twenty-five quarters, and the full fifty-two to 524,288,000 quarters. The sceptical may check his figures.

<sup>1</sup> 1 Lev. 111.





## THE SUPREME COURT OF PORTO RICO.

THE Supreme Court of Porto Rico, as at present constituted, was created by the Act of Congress approved April 12, 1900, commonly called the "Foraker Bill," providing a civil government for the Island. It consists of five justices and has the usual jurisdiction of appellate tribunals, with an appeal or writ of error to the Supreme Court of the United States, "in the same manner and under the same regulations and in the same cases as from the Supreme Court of the Territories."

The Spanish language has heretofore been used exclusively in all proceedings in this court, but on appeal to the Supreme Court of the United States, the whole record is required to be translated into English. No case has so far been brought to the Continental court from the Insular court for revision. An act has been recently passed authorizing the use of both the languages without distinction in all the courts and public offices throughout the island, and goes into effect the first day of July next.

The salary of the Chief Justice is five thousand dollars, and of each of the Associate Justices four thousand five hundred dollars, annually; being fixed by the Foraker law.

Since the institution of civil government in the island on the first of May, 1900, up to the first of March, 1902, there have been on the files of the Supreme Court of Porto Rico a total of 519 cases. Of these, 213 were civil and 306 criminal. Among the civil cases are classed those called in the Spanish law *administrative* and *contencioso*, which are appeals from the Executive branch of the Government.

Of the civil cases, 155 have been decided and 58 are yet left pending; and of the

criminal cases 27 are pending and 279 have been disposed of. Thus it appears that of the total of 519 cases entered, 434 have been decided and 85 are left yet remaining on the docket. This is certainly not a bad showing for a tropical climate.

José Severo Quiñones, the Chief Justice, was born in the capital city of Porto Rico, on the 6th of November, 1839, and attended school and college in his native town. He studied law in the universities of Seville and Madrid, taking his degrees in 1860. He engaged at once in the practice of his profession in his native island, and rose to eminence at the bar. He enjoyed a very lucrative practice until 1894, when he was appointed to a high office in the civil administration. He also held the office of Secretary of Agriculture, Commerce and Industry under the Autonomous Government. He was elected also a member of the House of Delegates. During the American occupation he was appointed by the Military Governor a judge of the Territorial Court. He was afterwards transferred to the Supreme Court, as organized under the Military Government by General Brooke.

On the 5th of June, 1900, President McKinley selected him for Chief Justice of the Supreme Court of Porto Rico. He has many friends among his countrymen, and is regarded by men of all parties as a thoroughly honest and able man, and worthy to be the head of the Porto Rican judiciary.

Louis Sulzbacher, the oldest Associate Justice, was appointed to that office by President McKinley on the 4th of June, 1900. He was born in Germany in the year 1840, and received a good education in his native land, where he mastered the French and German languages and the principles of the

civil law. He emigrated to the United States in his early manhood and settled in the Territory of New Mexico, where he soon became a naturalized American citizen. He engaged in agricultural pursuits while learning the

lated by his professional labor and skill. During his residence in New Mexico he made a life-long friend of Senator Elkins. Since his appointment to the Supreme Bench of Porto Rico he has rendered intelligent,



JOSÉ S. QUIÑONES, CHIEF JUSTICE.

common law and the Spanish and English languages. When properly prepared, he was admitted to the Territorial bar, and at once began a lucrative practice at Las Vegas, where he resided continuously until 1899, when he transferred his residence to Kansas City, Missouri, to enjoy the fortune accumu-

faithful and laborious service to the Government of the United States.

José Conrado Hernandez was born in Aibonito, Porto Rico, on the 19th of February, 1849. He graduated from the Jesuits' College in San Juan, in 1865, and from the Salamanca University in Spain in 1873.

He received in Spain the degrees of LL.M. and D.D. Returning to his island home, he practiced law for two years, becoming prosecuting attorney in 1877, and afterwards judge of the Court of First Instance, hold-

ary. He won golden opinions from his colleagues, and in 1898 returned, covered with many laurels, and served on the Bench under the Spanish government until the American occupation, when he was continued in service



LOUIS SULZBACHER, ASSOCIATE JUSTICE.

ing that position for many years in various parts of the island. He was transferred to the judiciary in Cuba in 1888 and held different posts in that island until 1891, when he was transferred to the Philippines. He remained there seven years, occupying many positions of great responsibility in the judi-

as a judge of the highest courts by the Military Governors. On the organization of civil government, in June, 1900, he was commissioned by the President of the United States as Associate Justice of the Supreme Court. This high post he still adorns with his talents and enlightens with his learning.

José Maria Figueras was born in San Juan, Porto Rico, in 1852, and there received his early education. He studied his profession of the law in the University of Galicia, Spain, from which institution he received the

at Manila, P. I., and afterwards in Cuba, at Santiago and Havana. He then became a District Judge in Porto Rico, and the American invasion found him discharging the duties of that very responsible office at Mayaguez.



JOSÉ C. HERNANDEZ, ASSOCIATE JUSTICE.

degree of B.L. On graduation, he returned to the land of his nativity and engaged in an active practice for many years, achieving the distinction which follows merit. He served for some time as Secretary of the Territorial Court at San Juan, with great distinction. For a while he was the prosecuting attorney

On the American occupation he was made the prosecuting attorney by the military authorities, and served with great satisfaction to the government and proportionate terror to evil doers. On the organization of civil government he was selected by the President of the United States as Associate Justice of

the Supreme Court. His vigorous intellect, practical experience and learning are of great value to the judiciary.

James Harvey MacLeary was born in Tennessee on the 27th day of July, 1845.

A.B. in 1868, and of B.L. in 1869. He then settled in San Antonio, Texas, and practised his profession, meanwhile serving as member of the State legislature, both in the House and the Senate. In 1880 he was



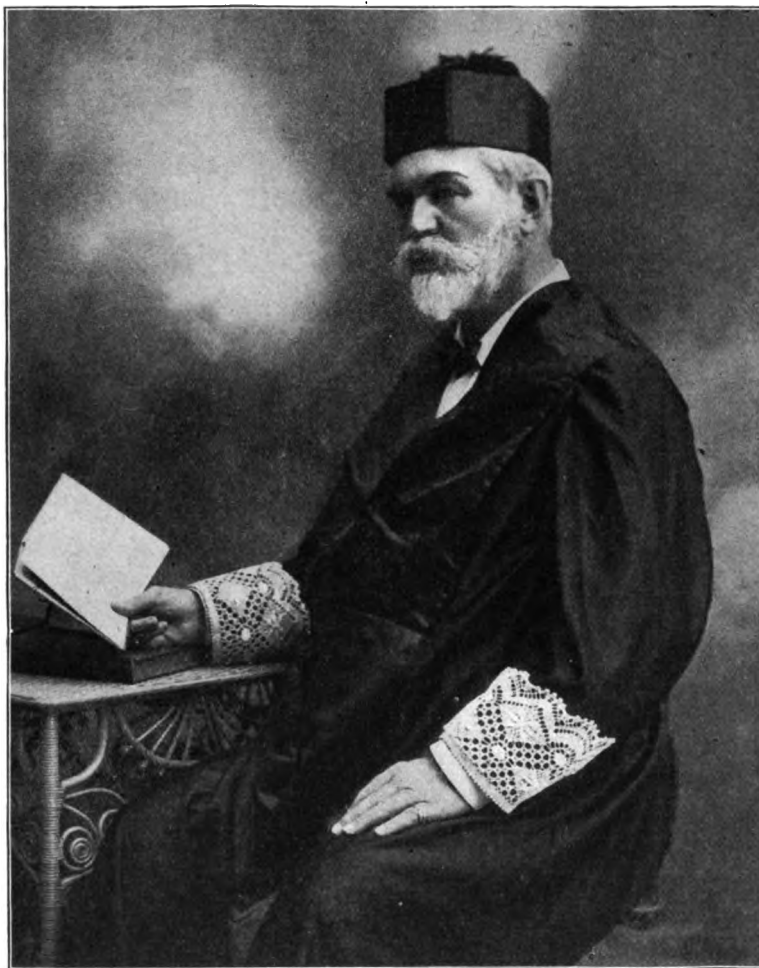
JOSÉ M. FIGUERAS, ASSOCIATE JUSTICE.

He landed in Texas with his father's family on January 15, 1856. He enlisted in the Confederate army in July, 1861, and served four years, receiving four wounds. After the Civil War, in 1866, he entered Washington College, now Washington and Lee University, and graduated with the degree of

elected Attorney General of Texas and served one term, declining on account of insufficient salary to be a candidate a second time. In 1886 he was appointed Associate Justice of the Supreme Court of Montana, and served on that bench two years, resigning on account of the rigorous climate. Re-

turning to San Antonio, Texas, he continued his law practice until the declaration of the war against Spain. He received a commission from President McKinley as Major and Inspector General in the volunteer army, and

General Wood in the civil service, as inspector of charities, and rendered good service to the island. He came to Porto Rico in February, 1901, as Assistant Secretary, and on the 4th of October was appointed



JAMES H. MACLEARY, ASSOCIATE JUSTICE.

served through the Santiago campaign. He was made Alcalde of Santiago de Cuba on the American occupation, and afterwards served as Inspector General of the Department of Santiago de Cuba on the staff of General Leonard Wood. On the dissolution of the volunteer organization he was continued by

Associate Justice of the Supreme Court by President Roosevelt.

To the American lawyer whose life has been spent in courts where the common law system prevails, there are many strange things in the practice of Porto Rico. Here we find the code system in its full vigor.

There are many excellent features in the Spanish codes, especially in the Civil Code, which is said to be constructed on scientific principles, and which has profited in a great degree by the experience of the Latin nations, from the time of Justinian down to the present day. The Criminal Code does not commend itself in such a great degree to the American mind. The refinements and delicate distinctions drawn between crimes of a kindred nature, and the carefully graded system of punishments, leaving nothing whatever to the discretion of the court, and especially the absence of the jury system, are not in accord with ideas springing from the great fountain of Anglo-Saxon liberty. Many crimes, also, are regarded as offences against private individuals instead of against the State, and after conviction even, the party supposed to be particularly injured can come into court and file a pardon, thus nullifying the judgment and setting the prisoner free.

The Supreme Court of Porto Rico, since its organization under the American military government on the 9th of August, 1899, has had nearly twice as many criminal cases as civil ones, and very few cases involving titles to land or principles of constitutional law. The court is limited in its jurisdiction to the correction of errors, and cannot review the facts of the case except as they are stated in the judgment of the court below. An appeal is allowed both in civil and criminal cases to every person interested in any case decided by the District Court, without bond or security of any kind. Thus the most frivolous cases command the attention of the Supreme Court equally with the most important. A quarrel between two fish-women, in which the usual epithets are hurled from one to the other, has been gravely paraded before the court of last resort in the Island for final settlement.

During the appeal, defendants in all except the gravest cases are permitted to remain at large. The Supreme Court has original jurisdiction in cases of malfeasance or misfeasance in office. Among the more important cases presented to the Supreme Court since the American occupation, are the following:

A district attorney was charged by the prosecuting officer with neglect of duty and accepting a bribe in an investigation made by him as to the occurrence of an incendiary fire. The judges of the District Court in which he exercised his functions were the principal witnesses, and were divided on the question two to one. The matter was tried in a public hearing by the Supreme Court and consumed several days. Great interest was manifested in the result throughout the island. Witnesses contradicted each other on every point, and finally the defendant was acquitted for lack of evidence. The strangest feature, however, of the trial was the fact that in making the statement in his own behalf, the accused acknowledged that one of the affidavits presented by him to the court was false, and excused himself on the ground that he had been falsely charged with accepting a bribe, and was fighting the devil with fire. It seems that this action on his part cannot be punished under the Spanish code, and apparently his prestige as a lawyer was not injured by the perjury or the confession of it. However, the Supreme Court recommended in the sentence acquitting him that he should be removed from office by the executive authority, which was promptly done.

Another case of great interest was that of a municipal judge who was tried before the Supreme Court for usurpation of jurisdiction. In cases where two municipal courts or district courts claim jurisdiction of the same case, the matter has to be referred to the Su-

preme Court for settlement, before the trial courts can proceed to judgment. In the case mentioned, the municipal judge had disregarded this article of the code, and proceeded with the trial of the case without waiting for the decision of the question of jurisdiction. He was promptly prosecuted and convicted, and fined \$200 and costs. Being dissatisfied, naturally enough, with the decision of the Supreme Court rendered against him, he attacked the judges with great violence in the newspapers, and, it is said, presented charges against them to the executive authorities, not only of the Island, but of the nation. However, the court calmly proceeded on its way, and sent the marshal to collect the fine, which was paid under protest.

Some two years ago, it may be remembered, five men were garroted at Ponce for having murdered a Spaniard, under circumstances of great barbarity, just after the landing of the American troops. Criminals at that time made an excuse of the unsettled condition of the country to attack everyone against whom they had any grudge, and to combine robbery and rape with murder and arson. A similar case to that of these people was brought before the Supreme Court not long since. Five men were accused of murdering a respectable old Spaniard, of ravishing two females belonging to his family, and of robbing his house. A party of thirty or forty had surrounded the house at night, in a remote district, and demanded entrance in the name of the American authorities. This being readily granted them, they shut the women and children up in one of the rooms, tied the five or six men belonging to the family in another room, and dragged the head of the family to an outhouse and murdered him by strangulation, cutting off his ears, and disfiguring his body with great indignity. They then ravished the women and gutted the house. Five of them only were

identified, and were convicted in the District Court at Ponce by a vote of two to one, of the three judges composing that court. The case was, of course, appealed to the Supreme Court of the Island and considered with great attention. One of the judges being sick, only four sat at the hearing. The judgment of the District Court was affirmed by a vote of three to one, the dissenting judge basing his opinion on the fact that one of the judges below had dissented, and that the old Spanish law required three judges to concur in fixing the death penalty. Under the Spanish code, in a capital case, after the affirmation of the judgment by the Supreme Court, the case must be referred to the fiscal (assistant attorney general), for his examination and report as to whether or not any circumstances attending the case justify a recommendation to the Governor for clemency. This course was followed, and the fiscal reported that the crime had been committed with circumstances of unusual barbarity, and that there was nothing whatever in the record justifying any recommendation for clemency. With this recommendation of the fiscal the two American judges concurred, but the two Porto Rican judges, including the one who dissented, who had participated in the trial, joined in a letter to the Governor, recommending the commutation of the death sentence from capital punishment to imprisonment for life. Applications for pardon, from all over the island, have been pouring in by hundreds to the Executive office. The Governor has not yet considered the matter sufficiently to determine whether executive clemency should be exercised.

Another interesting case was that of a tax gatherer and a notary. The tax collector had been appointed under the military government, to collect the taxes in four different townships, and required to give a bond in



each case. He had the bonds prepared, signed by himself and sureties, and came before a notary, where they were duly acknowledged and certified to by the notary. Filing his bonds, he collected all the taxes he could conveniently gather and sailed for Spain, but afterwards changed his destination to Paris, in order to enjoy more readily the fruits of his enterprise. In the meantime it was discovered that the persons who acknowledged and signed the bonds were not the persons who they represented themselves to be; in other words, that the documents were forgeries. Extradition proceedings were set in motion, and the absconding tax collector brought back. He was put upon his trial for emitting forged instruments, and the notary for making false certificates. Each was convicted, the tax collector being sentenced to twenty-four years' imprisonment, and the notary to six months. The cases were brought to the Supreme Court in regular course on appeal. That of the tax collector was affirmed. The notary's case presented some peculiarities. The Spanish code makes a very marked difference between a public and a private instrument, and the punishment is different when a false certificate is made with or without malice. Strange as it may appear, these official bonds, under the code, are private instruments, from the fact that they were not executed with the formalities required for public instruments. If they had been public instruments and the notary had certified to them, malice would not be necessary to be proven, but would be presumed. Being private instruments, it was necessary to prove malice in making the certificate. However, the District Court found the instruments to be private instruments, which was a correct finding, and they also found that the notary had acted without malice. Nevertheless, they sentenced him to six months' imprisonment. This was held to be erroneous, be-

cause the instrument being a private one, as found by the trial court, and the malice not being proven, it was impossible to convict of reckless negligence, which had been the charge, and on which judgment he was sentenced. The case was reversed, and the notary exonerated. The defendant being a very well-known and popular man, of influential connections, the case made quite a noise from Fajardo to Mayaguez.

One of the most important civil cases which has been tried before the Supreme Court was a divorce case, involving the construction of the Organic Act, which provides that "All persons lawfully married in Porto Rico shall have all the rights and remedies conferred by law upon parties to either civil or religious marriages." The District Court held that this language meant that the marriages to which it referred must have been performed in the Island of Porto Rico, and, as the parties litigant were married in Spain, that the Organic Act did not apply to their case, and further, that being citizens of Spain they were governed in their marital relations by the laws of Spain, and not by the laws of the United States. As no divorce can be granted under the Spanish law, the divorce was refused. The decision of the District Court in both of these particulars was reversed by the Supreme Court, and the divorce granted.

There are cases pending in the Supreme Court at present, involving the question as to whether conspiracies to raise the price of labor are punishable in Porto Rico, as they were under the Spanish code, and whether or not newspapers prior to publication have to comply with all the restrictions imposed by the Spanish codes, and in several other cases of apparent conflict between the existing code and the Constitution and laws of the United States. The late decisions made by the Supreme Court of the United States

in the insular cases, afford material assistance to the Supreme Court of Porto Rico in solving some of these interesting questions.

Since the American occupation, the opinions of this court have been published in the *Official Gazette*, a daily newspaper issued at the capital. These publications simply give a certified copy of the *sentencias* or opinions, without head notes or other explanation. A bill has just passed the Legislature authorizing the publication of all the opinions rendered since the organization of the court, in volumes similar to those of the United States Supreme Court reports, to be

called "Porto Rico Reports," and numbered consecutively. The Attorney General being authorized by the bill to designate one of the justices of the Supreme Court to act as reporter and supervise the preparation and publication of these opinions, has selected for that duty Associate Justice MacLeary, who will immediately begin to have the opinions translated. At the same time, he will prepare the syllabi in English and Spanish, and otherwise arrange the cases for orderly publication. It is supposed that the first volume of reports will be issued in about six months.

## A SOLOMON OF THE TURKEY ROOST.

BY HENRY BURNS GEER.

IT was a great day at Barney's Point — the day that Rube Wilkins brought suit before Squire Patton to replevin a hen turkey and her brood of half-grown turks.

Wilkins lived just across the road from Joshua Nelson, and he charged that the latter had alienated the birds from his kindly care and supervision, and had caused them to take up with his own fowls, to his (Wilkins) displeasure and financial loss; and further, that when he had remonstrated with his neighbor in a neighborly way, the latter had turned unto him a deaf ear, and had refused to deliver the turkeys over to him, their rightful owner. Therefore, he prayed the court for a replevin warrant, and an officer to execute it, that he might lawfully recover possession of his property.

The neighboring farmers were there for miles around, and the plow-shares rested quietly that day. The opposing counsel argued the case very learnedly, and the witnesses were most painstaking and explicit in

their evidence. It was evident, long before the case was half over, that it would be a hard question for the Squire to decide. And, besides the legal aspect of the case, there was the political side to it. How could Squire Patton afford to render a decision against either side, when the election was only about a month off, and both sides about equally strong in votes?

The evidence was all in finally, and the question up to the court for a decision. The Squire wore a self-satisfied look, as if he had reached a happy solution of the matter, that would be satisfactory to all concerned, as he arose and rapped for order. In a minute all was quiet, — men craning their necks eagerly forward to catch every word of the expected decision:

"The officers will now bring the turkeys into court," the Squire said gravely, and then he sat down, and leaned back in his seat, with his eyes closed.

A buzz of surprise ran around the room

at this request, but it was quickly complied with, as the fowls had been cooped, — awaiting the decision of the matter.

Then the Squire rose quickly, and addressing a constable said :

“Release the turkeys in the road ;” and then turning to the contestants and witnesses, he continued :

“The court reserves its decision until the turkeys, just released, go to roost, and, in the meantime, all the gentlemen present are invited to join the court, that we may observe the birds select their roosting place.”

This announcement made the plaintiff and his friends smile. They construed it as a verdict in their favor ; while the defendant looked uneasy.

But all turned out to watch the manœuvres of the birds. They fed leisurely along down the road, and as it was getting late in the evening, they made upward glances with heads one-sided at every overhanging object they passed. Finally, they left the grass and took up a line of march straight down the road in the direction of Rube Wilkins' home, — the honorable court, and all interested, to the number of forty or fifty men,

following gravely along at a safe distance behind, that they might not frighten the fowls.

On down the road they went, straight to Wilkins' back-lot bars, where they turned, went single file over to the horse-trough, drank with solemnity, then filed about to the barn shed, where the mother turkey said a few words to her young, — looked first with one eye, then with the other up to some poles stretched across, where there used to be some hay, then deliberately flew up there and settled down for the night — followed by every blamed young turkey in her brood !

Squire Patton sprang up on a stump where he was in full view of both audiences, — the turkeys and the litigants with their friends, — and, clapping his hands for order, said :

“You gentlemen are all aware that ‘chickens will come home to roost.’ It is the belief of this court that turkeys will also come home to roost, and, therefore, the court decides this case in favor of the plaintiff.”

A shout of approval mingled with exclamations of admiration greeted this decision.

The next day the Squire's opponent withdrew from the race.



LONDON LEGAL LETTER.

MARCH, 1902.

TWO cases, of a widely different nature, have recently attracted the attention of the lay public to the courts. In one of them certain phases of the ecclesiastical law of the kingdom for the past five hundred years have been carefully reviewed, and in such a manner as to excite comment upon the erudition which many of the judges and counsel, and those, particularly, who are supposed to be engrossed with modern commercial disputes, are able to exhibit. Interest was added to the litigation by the fact that it was started by an extreme faction of the Church of England, those who advocate the evangelical or "low-church" practice. Canon Gore, who it was claimed was a ritualist, had been appointed Bishop of Worcester, and, in usual course, the appointment was referred to the Archbishop of Canterbury for confirmation. The Vicar General, acting for the Archbishop, refused to hear objections, and the objectors obtained a rule *nisi* for a mandamus to compel him to do so. The case was argued at great length, and antique Roman Latin in musty volumes was quoted for hours. Within three days after the arguments were concluded the Lord Chief Justice delivered a judgment which filled four solid columns of *The Times*, and the two other judges sitting with him added two other columns. The opinions were marvels of learning, but what would have most surprised an American lawyer was the promptness with which they were handed down, particularly considering the recondite nature of the questions the judges were called upon to decide, and the quantity of almost obsolete authorities that must be examined. The decisions were adverse to the contention of the objectors to the confirmation.

The other case was one in which several men were put upon their trial, one for forging bank checks, and the others for conspiring with him in the fraud.

One Goudie, a clerk in a Liverpool bank, had succeeded in getting no less than close to \$600,000 out of the bank on forged checks. He drew the checks in the name of a wealthy depositor in the bank, sent them to his co-conspirators in London, and then when the checks came, instead of charging them up to the account of the nominal drawer, destroyed them. He was able to do this through being the ledger clerk, having in charge the books in which the checks of the particular depositor would, in the ordinary course of business, have been debited against him.

One of the features of the trial was the clever way in which the judge assisted in forcing a restitution of the proceeds of the forgeries, which, having passed into the hands of third parties, or having been secreted, could not otherwise have been recovered. The trial was concluded on Thursday, when the judge announced that he could not sentence the prisoners until the following Saturday, and that his sentences would be influenced by their efforts and those of their friends in bringing the money into court. This course was eminently successful, and led to the restoration of nearly sixty per cent of the plunder.

A bill has been introduced into Parliament during the past fortnight which will probably be passed without much opposition, and which will materially modify patent practice in this country. It is the outcome of the report of a committee which rendered its report last March, after having taken a large amount of evidence of well-known experts.

The chairman of the committee was Sir Edward Fry, a retired judge of the High Court, and among its members were Lord Alverstone, the present Lord Chief Justice, and Mr. Fletcher Moulton, K. C., who is the leader of the counsel who are most frequently engaged in patent litigation. It is well known to those who are versed in patent law that the practice in this country has occupied, so far as the grant of letters patent is concerned, an intermediate position between two extremes. In certain countries, including France, a patent imports little more than that it has been registered, and the certificate expressly states that it conveys no official guarantee as to its novelty. In the United States, Austria and Germany, a patent is granted only after a rigorous examination is made as to novelty, and consequently when it is issued it is of some value. In this country the rule, as it now stands, is that unless there is *prima facie* some appearance of identity in the patent claimed with some prior existing patent, the Comptroller will seal the patent. The Solicitor General, to whom an appeal lies from the Comptroller, has laid it down as a principle to be followed, that where the matter of identity is much in doubt it is better to run the risk of putting the party opposing the grant to the costs of making out his case in some ulterior proceedings, than to withhold the seal from the patent in the first instance. In a well-known case, Sir Edward Clarke, when Solicitor General, said that having regard to the fact that by allowing the issue of a patent he did not close the matter, but left it open to the opponent to challenge in a court of law the valid-

ity of the patent, he did not think he ought to refuse a patent to be sealed unless he was satisfied that no jury could reasonably come to a decision in favor of the applicant.

The new bill provides that where an application for a patent has been made, and a complete specification has been deposited, the examiner, in addition to ascertaining whether the nature of the invention has been fairly described, and the application, specification and drawings have been prepared in the prescribed manner (as now required), shall make a further investigation to ascertain whether the invention claimed has been wholly or in part claimed by any previously published application within fifty years past. If he finds that there has been a prior claim within the period named, the applicant must be informed, and he will then be permitted to file an amended specification. The Comptroller, if satisfied as to the amendment or disclaimer, will seal the patent or not as he deems proper. From his decision an appeal will be, as at present, to the Solicitor General. The new act specifically provides that the investigations and reports required by the act shall not be held in any way to guarantee the validity of any patent. It is further and most usefully provided that an invention shall not be deemed to have been anticipated by reason only of its publication in a specification deposited in any Patent Office pursuant to an application made not less than fifty years before the new application. These provisions, which will come into effect on the first of January next, will be of considerable interest to American inventors.

STUFF GOWN.



# The Green Bag.

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor,  
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

*The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.*

THE GREEN BAG has not joined the ranks of the soubrettes or of the *primæ donna*, whose jewels are stolen, periodically, when the press-agent is hard-pushed for an advertising sensation; but this felonious mode of advertising has been forced upon us. Shortly before the time for going to press a "thief in the night," entering the establishment of our printer, became enamored of a large number, to wit, fifty-three galleys from which the present and future numbers of THE GREEN BAG were in part to be printed, and converted said galleys to his own use. We feel flattered that, even under such untoward circumstances, GREEN BAG articles should prove of compelling interest to a gentleman presumably not of the legal profession; but such a taking method of expressing appreciation has its disadvantages, in that it compels resetting of matter, with consequent delay in publication. It is to explain this short delay, rather than for the purpose of advertisement, that we mention the loss of our jewels.

WHAT principles should guide the Court in pronouncing a criminal sentence? When awarding punishment, do criminal judges act on settled principles, and is uniformity in this respect desirable? An important first-step toward solving these problems was taken in Paris in 1900 by the International Congress of Comparative Law, which appointed a Commission to investigate the question. A recent circular of this Commission, after noting the three district theories of punishment — the expiatory, the deterrent, and the reformatory, — and mentioning certain circumstances which are sometimes taken into consideration in determining sentence, asks for answers to the following suggestive questions:

QUESTION 1. Does the judge, in fact, when awarding a sentence, act on any theory as to the object of punishment, such as retribution, expiation, example to others, reformation of the offender, or the like? Is it desirable that he should do so?

QUESTION 2. Does the judge, in fact, keep the same end in view in the case of all offences, or does he make a distinction between one offence and another? Is it desirable that he should do so?

QUESTION 3. When he makes a distinction between one offence and another, on what is the distinction based? On the character of the punishable act looked at from a moral standpoint? On the greater or less frequency of the crime in the district? On the greater or less risk to which it exposes the community, or on any, and what, other circumstances?

QUESTION 4. When he makes a distinction between one individual and another, does the distinction turn on the offender's antecedents as shown by his judicial record, or on his degree of intelligence and education, or on any other, and what, circumstance? Is the age or sex of the offender taken into account, and if so, to what extent? Is it desirable that any, and which, of the distinctions mentioned above should be made?

QUESTION 5. In the absence of special circumstances, does the judge award the full penalty allowed by the law, or does his normal sentence fall short of this?

From a study of the answers to these questions the Commission hopes to discover what are the guiding principles of punishment at the present time, and what principles ought, in the opinion of the authorities consulted, to prevail. It would seem that the Commission has ground for hoping that its recommendations, which will be submitted to the next International Congress of Comparative Law, will result in the framing of a set of practical rules "worthy of being accepted

and acted on by all who take part in the administration of criminal justice."

THE Bench has robbed THE GREEN BAG of an old and esteemed contributor. A. Wood Renton, Esq., has been appointed to a judgeship in Mauritius, and the press of official duties has made it impossible for him to continue his series of "Cases from the Old English Law Reports," begun in the last volume. It is a pleasure to congratulate Mr. Renton on this well-deserved appointment, and we trust that his retirement from the ranks of GREEN BAG contributors is not permanent. The series will be continued by Max A. Robertson, Esq., of London, whom we are glad to welcome as a contributor.

#### NOTES.

LAWYER: When I was a boy my highest ambition was to be a pirate.

CLIENT: You're in luck. It isn't every man who can realize the dreams of his youth.

A BARRISTER asked Lord Mansfield when a certain case would be tried.

"Next Friday."

"Will you consider, my lord, that next Friday will Good Friday?"

"I don't care for that," said Lord Mansfield, "the better the day, the better the deed."

"Well, my Lord, if you sit on that day, you will be the first judge who has done business on that day since Pontius Pilate's time."

AT Caruthersville, in the southeastern part of Missouri, the grand jury had returned quite a number of indictments against parties for carrying concealed weapons, and among those who had thus violated the law was a well-to-do saloon-keeper. When his case came up, the defendant having pleaded guilty, the judge said:

"Stand up, Mr. Blank."

The defendant did as requested, and the judge, somewhat severely, exclaimed:

"Mr. Blank, I fine you fifty dollars."

"All right, Judge!" cried the saloon-keeper delightedly. "I've got it right here in my pocket," slapping his wallet boastfully.

"And three weeks in jail," continued the judge. "Have you got that in your pocket, Mr. Blank?"

THINGS are done in a breezy way in the West. For instance, a Kansas lawyer prints his portrait in the local paper and adds this bit of philosophy: "I was born, am living, and I suppose will have to die. As to what I can do, bring me your business and try me."

IN the mountain sections of the south, in the old days when the judges, on horse-back, rode the circuits of the courts, the members of the bar, travelling in similar style, accompanied them, and good fellowship naturally followed. It was usually the case that his honor, being a gentleman of the old school, took his brandy and water with regularity and relish. To this indulgence at his inn would often be added the diversion of a modest game of poker. In Georgia, in the county of R——, bordering on the North Carolina line, at the fall term of the court, many years ago, the judge who was to preside arrived at the town tavern on the afternoon preceding the day on which the court was to convene, and after supper a number of the lawyers, as their habit was, gathered at the room of the genial and convivial dignitary to pass the evening. As an accompaniment to the "apple jack," thoughtfully provided by the host, there was nothing more natural and agreeable than a friendly game of draw. Into the good-humored gathering, at the invitation of the inn-keeper, had dropped a couple of the well-known planters thereabouts — among the men of the best figure in the county — desiring to meet his honor and to renew acquaintance with their legal friends. A game was soon going, all hands joining in, and it was a late hour before chips were cashed and the jovial party dispersed. On the following morning, after duly opening court, the judge began his charge to the grand jury. After giving in charge the most important things, his honor said:

"Now, gentlemen of the jury, I come to charge you concerning the pernicious habit of gaming, — the vice of poker playing. I do not know anything about it myself," and looking up from his manuscript and glancing over his spectacles, that hung low on his generous nose, he espied on the jury one of the planters who had been in the game with him the night previous; so clearing his throat he continued, — "that is, I don't know *much* of it, but it's a pernicious practice and should be broken up."

JUDGE H. H. TRIMBLE, of Keokuk, Iowa, general manager of the St. Louis, Keokuk & Northwestern Railroad, is a lover of the hunt, and together with Judge N. M. Hubbard, of Cedar Rapids, passes much time on the prairies gunning for game. The two judges are old cronies, and made many trips together.

The prairie chicken season in Iowa opened September 1, but Judge Trimble decided that as the first of the month came on Sunday he had the right to hunt chickens the last day of August. So he and Judge Hubbard started out the day before the season opened, and, going into northern Iowa, had a good day's sport.

When the day's hunt was over, they had a half-dozen chickens to their credit, and with these went to the little hotel at Ledyard, where they prepared to devour their prey. While they were quietly eating at the table, a stranger entered and sat down.

"Been out chicken-hunting?" asked the man, as he gazed at Judge Trimble's plate.

"Yes," said the judge, who is a sociable sort of a fellow, as he took another mouthful of the tender fowl.

"Much luck?" again asked the man.

"Pretty good," replied the judge. "I shot four chickens, and Judge Hubbard got two. We're having some of 'em now."

The stranger continued the conversation for a time, and then said:

"I'm Deputy Game Warden Reilly; please consider yourselves under arrest."

And there was nothing for the two judges to do but submit. The game warden insisted on taking them before the court at Algona, thirty miles away, and the judges were compelled to go.

Now, the road entering Algona is the Northwestern, of which Judge Hubbard is a prominent official. So the judge hunted up the conductor when the train arrived, and told him not to accept the judges' annuals, but to compel the warden to pay their full fares to Algona. The warden was notified that he must buy tickets for his prisoners.

As he told the story afterwards, Judge Trimble said:

"I instructed the conductor that in case the game warden did not pay our fares or furnish tickets, he must put us off on the prairies. That

is where we had intended to be all the time, and of course that is where we would have preferred to be put off."

But the game warden was game, bought the tickets, and paid the judges' fares to Algona, although both had annuals, and took them before a magistrate, where Judge Trimble was fined \$30, and Judge Hubbard escaped, because he argued the legal proposition so learnedly that the judge was loath to fine him.

Two Irishmen passing through a graveyard came to a stone. One of them stooped down to read the inscription, which was "Here lieth a lawyer and an honest man."

"By gorry," said the other, "how came they to put two men in one grave?"

WE have it on the authority of *The Lyre* that the following is a "true copy" of an Irish will: "In the name of God, amen! I, Timothy Delona of Barrydownderry, in the county of Clare, farmer; being sick and wake in my legs, but of sound head and warm heart; Glory be to God! — do make the first and last will, the ould and new testament; first, I give my soul to God when it pleases him to take it; sure, no thanks to me, for I can't help it then; and my body buried in the ground at Barrydownderry chapel, where all my kith and kin have gone before me, an' those that live after, belonging to me, are buried, pace to their ashes, and may the sod rest lightly over their bones.

"Bury me near my grandfather, Felix O'Flaherty, betwixt and between him and my father and mother, who lie separate altogether, at the other side of the chapel yard. I lave the bit of ground — 10 acres — rale old Irish acres, to me eldest son, Tim, after the death of his mother, if she survives him. My daughter, Mary, and her husband, Paddy O'Ragan, are to get the white pig. Teddy, my second boy, that was killed in the war of Amerikay, might have had his pick of the poultry, but as he is gone I'll lave them to his wife, who died a wake before him; I bequeath to all mankind fresh air of heaven, all the fishes of the sea they can take, and all the birds of the air they can shoot; I lave to them the sun, moon and stars. I lave to Peter Rafferty a pint of ful-poteen. I can't finish, and may God be merciful to him!"



It seems that in Philadelphia, as well as in Boston, there is some difficulty in finding a satisfactory test of drunkenness. For example (according to the *Baltimore Sun*), Judge Audenried, of the License Court, asked a witness — an agent of the Law and Order Society — what was his definition of “drunk.”

“‘I regard a man as drunk when he is visibly affected by liquor,’ was the answer.

“‘Yes; but we would like you to be more specific,’ said the court.

“‘Well, I take it from a man’s conduct, the general appearance of his face; but I do not necessarily mean that he shall stagger. Others have a habit of leaning against the rail around the bar.’

“‘I notice that while giving your testimony you yourself have been leaning on the bench. You wouldn’t have us regard that as being an evidence of intoxication on your part, would you?’ inquired Judge Audenried.

“The agent colored up and answered that he would hardly like the court to consider the question in that light.

“Judge Ralston said he understood that saloon bars were supplied with rails for the purpose of leaning against.”

For our own part we prefer to take Judge Ralston’s view of the matter, rather than the agent’s. If the latter’s view should prevail, it would seem that the bar-rail must be put in the same class with the deadly “third-rail.”

A LAWYER who studied in Mr. Lincoln’s office tells a story illustrative of his love of justice. After listening one day for some time to a client’s statement of his case, Lincoln, who had been staring at the ceiling, suddenly swung around in his chair, and said:

“Well, you have a pretty good case in technical law, but a pretty bad one in equity and justice. You’ll have to get some other fellow to win this case for you. I could n’t do it. All the time, while talking to that jury, I’d be thinking: ‘Lincoln, you’re a liar,’ and I believe I should forget myself and say it out loud.”

THE GREEN BAG is indebted to an English correspondent for the following interesting note concerning judges as plaintiffs or defendants:

Early in the seventies an action was brought

by the “Inhabitants of Surrey” against the “Inhabitants of Middlesex” for the non-repair of Walton Bridge. The case was set down for trial at Maidstone Assizes. The solicitor-general (who in those days was allowed to have a private practice), Mr. Murphy, Q. C., and other well-known counsel were briefed for the plaintiffs. The solicitor-general’s fee, it is stated, was three hundred guineas.

On the judge taking his seat a junior counsel, in the absence of both his leaders, made an application to his Lordship, pointing out that it was impossible for his Lordship to try the case, which was in the nature of an indictment, the inhabitants of the county of Surrey being plaintiffs and the inhabitants of the county of Middlesex being defendants, because he (the counsel) understood his Lordship was an inhabitant of Middlesex and therefore a defendant. The Lord Chief Justice (Coleridge) agreed that that was so. “But,” said his lordship, “what strikes me as a difficult problem to solve is that the whole of my learned brothers must be, as inhabitants of one county or another, plaintiffs or defendants. However, sufficient for the day is, etc.; you must of course go elsewhere.”

In 1877 it was found necessary to pass an act called Judicial Proceeding (Rating), to enable this case to be tried. The following is a copy of the first section:

1. No judge shall be incapable of acting in his judicial office in any proceeding, by reason of his being, as one of several ratepayers, or as one of any other class of persons, liable, in common with others, to contribute to or to benefit by any rate which may be increased, diminished or in any way affected with such proceeding.

AFTER hearing evidence in an assault case between man and wife, in which the wife had had a deal of provocation, the magistrate turning to the husband, remarked: “My good man, I really cannot do anything in this case.”

“But she has cut a piece of my ear off, sir.”

“Well,” said the magistrate, “I will bind her over to keep the peace.”

“You can’t,” shouted the husband; “she’s thrown it away.” — *Tid-Bits*.

London has 5,272 barristers and solicitors.

NEW LAW BOOKS.

MISCELLANEOUS WRITINGS OF THE LATE HON. JOSEPH P. BRADLEY, Associate Justice of the Supreme Court of the United States. Edited and compiled by his son, *Charles Bradley*. 1901. Newark, N. J.: L. J. Hardham. Cloth. (xii + 435 pp.).

The most interesting part of the present volume is the thirty pages dealing with the Legal Tender cases. After quoting at length a letter of Senator Hoar, dated December 7, 1896, there is given, now for the first time in print, a statement, signed by a majority of the Court at the time, of facts relating to the re-argument of the Legal Tender cases. Senator Hoar, it will be recalled, showed by a comparison of the dates on which the first Legal Tender case, *Hepburn v. Griswold*, was considered and later agreed to in conference, and on which, afterwards, the decision was announced, with the dates on which the nominations of Secretary Stanton and Judge Hoar and of Judges Strong and Bradley were made, that the charge of packing the Court was unfounded, unless, indeed, three things could be proved which have not been proven — that the views of the Justices in their first conference on the case had leaked out, that these views had become known to the President and his advisers, and that in consequence of such knowledge the nominations of Justices Strong and Bradley were made, and would not have been made but for that.

The "Statement," signed by Justices Swayne, Miller, Davis, Strong and Bradley, is in answer to a paper filed — but afterwards withdrawn — by the Chief Justice, in behalf of himself and Justices Nelson, Clifford and Field, stating the reasons why they dissented from the order of Court involving a re-argument of the legal tender question. This dissent was based on a supposed agreement of the Court and of counsel that all of the cases in which the legal tender question was involved should abide the decision in *Hepburn v. Griswold*. The "Statement" of the majority is a vigorous denial that there was any such agreement, and charges that the paper of the Chief Justice "invades the sanctity of the conference room" and gives a view of the question at variance with the records of the Court. The original draft — also printed here — of the

"Statement" contained a severe arraignment of the change by Mr. Justice Grier of his vote on the *Hepburn* case, but this was toned down in the final form.

The paper filed by the Chief Justice was withdrawn from the files of the Court, and for that reason the "Statement" in answer to it was never filed. This latter document was preserved, however, by Mr. Justice Miller by whom it was prepared, and on his death came into the possession of Mr. Justice Bradley, who, on his death, consigned it to the keeping of his son with the injunction, in which Mr. Justice Strong, the surviving signer of the "Statement" concurred, that it should not be printed "as long as any justice who was on the bench at that time was still living. The recent death of Mr. Justice Field released this obligation, and thus now, for the first time, there is a clear understanding of what is, in some respects, the most unfortunate incident in the history of the Court. But now that this secret history has come to light, we cannot but express our admiration for the courage of Justices Strong and Bradley in withholding this publication, even though by such action they were subjected for years to the unjust attacks and the most bitter abuse. And when we consider the charge of a like nature, but equally unfounded, made against Mr. Justice Bradley in connection with the Electoral Commission, where his was the deciding vote, we cannot but feel deep regret that his judicial career brought to him so much undeserved bitterness.

The larger part of the present volume is taken up with letters, short essays and studies, which are interesting as showing the strong personality and active mind of the writer, and the wide range of questions which claimed his attention. The matters on which he wrote and spoke were sometimes political, historical, legal or philosophical; sometimes scientific or mathematical; sometimes religious. "Much, probably three-quarters, of the time occupied in studies distinct from those incident to the prosecution of his profession, was devoted," says his son, to "mathematics, his favorite study." A result of this love and study of mathematics was the preëminence of Mr. Justice Bradley in complicated patent litigation which came before the Supreme court while he was on the Bench; although probably

his most important judicial work was in developing the law relating to interstate commerce.

The volume contains, also, a short biography by his son, and two able legal studies, — "The Judicial Record of the late Mr. Justice Bradley," by William Draper Lewis, the associate editor of the *American Law Register and Review*, and his "Dissenting Opinions" — among which was one in the Slaughter House cases — by the late A. Q. Keasby.

THE JOURNAL OF THE SOCIETY OF COMPARATIVE LEGISLATION. Edited by *John Macdonell, C.B., LL.D.*, and *Edward Manson*. New Series, No. VIII. December, 1901.

The frontispiece of this number is an excellent photogravure portrait of the Hon. J. H. Choate, while the leading article is a short, but appreciative, biographical notice of the American Ambassador, by R. Newton Crane. Sir Frederick Pollock and Sir Dennis Fitzpatrick contribute the second article on their respective subjects, "The History of the Law of Nature" and "Non-Christian Marriage." G. G. Phillimore gives an interesting and — in view of recent occurrences in China and elsewhere — timely study of "Booty of War."

Bearing on an international question of a more pacific nature is Wallwyn P. B. Shephard's paper on "The Most Favored Nation Article," which sums up the effect of such a clause as follows:

"The interpretation that both treaty Powers retain their liberty, notwithstanding this article, to adopt measures necessary to protect their own subjects or citizens, gives as much effect as it seems possible to give to this treaty engagement. Such reserved power and liberty enable, if necessary, either treaty Power to accord different treatment as between the other treaty Power and third Powers; but such variation being consequent upon acts within the volition of the Power objecting, seems to be no violation of the most favored nation engagement, on the principle of *volenti non fit injuria*."

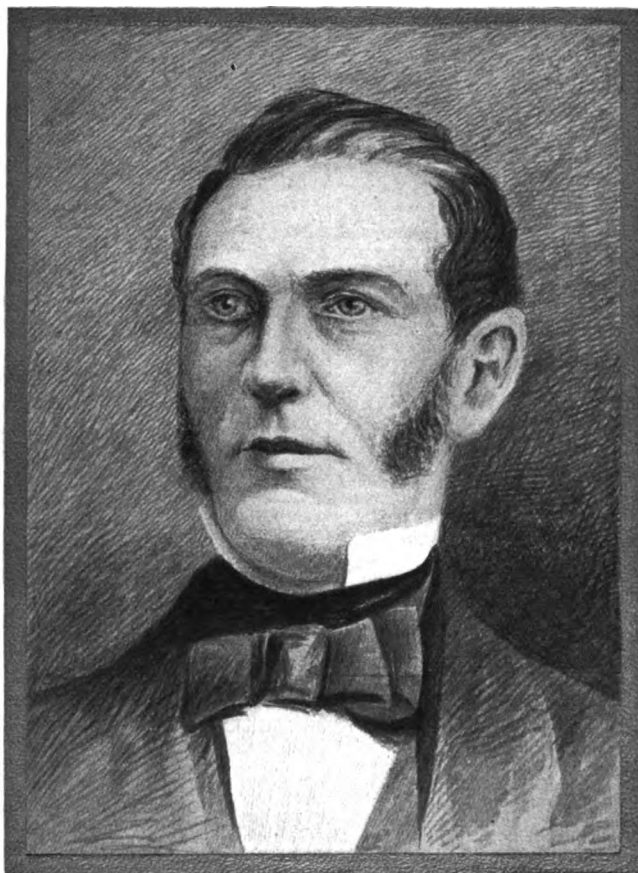
A third or more of this number is given over to the "Review of the Legislation of the British Empire in 1900," — as usual with these "Reviews," a valuable compilation by several hands. We have space to enumerate only a few of the interesting items which a rather hasty examina-

tion disclosed; for instance, Tasmania alone passed legislation regulating the speed of automobiles, and this same colony prescribed penalties in the case of any person under thirteen years of age who smokes tobacco in any form in a public place, and of the tobacconist who supplies such person with the weed; in the Straits Settlements, owners of jinrikishas must be photographed for purposes of identification; a Gold Coast mining ordinance provides a fine "if any chief or other person shall declare or represent any land effected by any concession," etc., . . . "to be fetish land"; Trinidad and Tobago define the term "corporal punishment" to include, in the case of female offenders, having the hair cut short; New Zealand allows marriage with a "deceased husband's brother" — a variation of a familiar theme; Antigua, with rare regard for the interests of the patient, sets a fee of one shilling for successful vaccination; Tasmania forbids the hunting of the opossum, which looks like a form of cruelty to the negro; and Mr. Manson, in noting legislation as to voting machines, in Ontario, remarks with quiet humor that "this has nothing to do with political organization."

A MANUAL RELATING TO THE PREPARATION OF WILLS; with an Appendix of Forms. A Book of Massachusetts Law. By *George F. Tucker*. Second edition. Boston: George B. Reed. 1902. Law sheep: \$3.50. (liii + 382 pp.)

The first edition of this excellent manual was published eighteen years ago, and made for itself at once a place on every Massachusetts lawyer's shelves beside those indispensable volumes, Crocker's "Notes" and "Common Forms" and Smith's "Probate Law." Since that time many new points have arisen, and are included in the present edition; and the number of cases cited is doubled. The forms given in the appendix are of very practical value to the practising lawyer. Indeed, this volume, while primarily based on Massachusetts statutes and decisions, is by no means limited to use in that Commonwealth, for with the checking of such knowledge as every lawyer naturally has of local statutes and decisions, this manual can be used with advantage by the profession generally. The Index is well done; and all in all Mr. Tucker has given us an excellent and convenient manual.





JAMES S. GREEN.

# The Green Bag.

VOL. XIV. No. 5.

BOSTON.

MAY, 1902.

JAMES S. GREEN.

BY CHARLES W. SLOAN.

WHEN, some two years ago, the statue of Thomas H. Benton was received by Congress to be placed in the Hall of Fame in the Nation's Capitol, splendid eulogies were pronounced on the life and character of Missouri's illustrious statesman. The people of Missouri were, however, then painfully reminded of the fact that Benton's great rival and competitor, who also had represented the State in the United States Senate, lay buried in a neglected grave, in a cemetery near the little town of Canton, Missouri, his former home, without so much as a stone to mark his resting place; that for twenty-nine years he had slept with no monument to testify to the appreciation of his former friends and admirers. Then, too, was recalled what James G. Blaine, in his "Twenty Years of Congress," had said of him: — that "No man among his contemporaries had made so profound an impression in so short a time. He was a very strong debater. He had peers, but no master in the Senate. Mr. Green, on the one side, and Mr. Fessenden, on the other, were the Senators whom Douglas most disliked to meet, and who were best fitted in readiness, in accuracy, in logic, to meet him. Douglas rarely had a debate with either in which he did not lose his temper in debate; and to lose one's temper in debate is generally to lose one's cause."

James Stephen Green was born in Virginia, February 17, 1817. His early oppor-

tunities for education were limited, being confined mainly to the common schools of his time. Seized, however, with an uncommon desire to acquire knowledge, he became a hard student, a great reader, and finally a good classical scholar. Removing to Missouri about 1836, he first worked on a farm, and then in a sawmill. While thus engaged he determined to study law; and amid such difficulties — borrowing law books to read — he qualified himself for admission to the bar in 1840. He soon attained prominence in his chosen profession, and became one of the ablest *nisi prius* lawyers in his section of the State, building up a large practice.

In 1845 he was a member of the Missouri Constitutional Convention, where he demonstrated signal ability as a constitutional lawyer, and began to attract attention as such in his State. He had in the meantime acquired a taste for politics, being placed on the Democratic electoral ticket for 1844, and in his brilliant canvass of the State that year attracted considerable notice as a stump speaker. He was elected to Congress for two successive terms — in 1846 and 1848. He became the pronounced leader of that wing of the Democracy maintaining the doctrines advocated by John C. Calhoun, and necessarily the leading opponent of Thomas H. Benton. In 1849, when Mr. Benton made his celebrated "appeal" to the people of his State, in which, after thirty years' continuous service in the United States Senate,

he made the fight of his life for vindication and reflection, it was Green who followed and bitterly opposed him wherever he spoke. Benton always refused to engage in joint discussion; hence, as soon as he would finish his speech, Green was on hand to reply. Benton would not wait to listen to his adversary. On one occasion, however, Benton was forced by some circumstance to listen. In this speech Green made a statement which aroused the ire of "Old Bullion," who immediately interrupted by saying: "Mr. Green, the Bible says thou shalt not lie." "Yes," retorted Mr. Green, "and the Bible says thou shalt not steal, Mr. Benton," alluding to some exploded old story about Benton's early life. The result of this campaign was the defeat of Benton. Mr. Blaine, in referring to this campaign, says: "Green had done more than any other man in Missouri to break down the power of Thomas H. Benton as a leader of the Democracy. His arraignment of Benton before the people of Missouri, in 1849, when he was but thirty-two years of age, was one of the most aggressive and successful warfares in our political annals. His premature death was a loss to the country. He was endowed with rare powers, which, rightly directed, would have led to eminence in the public service."

In the discussion in Congress of the great and exciting issues which then, and indeed for a decade afterwards, agitated the country, Mr. Green came rapidly to the front for one so young, receiving from the press of the whole country favorable notice, and achieving an almost national reputation. In 1852 President Pierce appointed him as Minister to Bogota, New Granada; but this position proved too monotonous for one of his nature. He longed to get back to the more congenial atmosphere of political life, resigned, and came home. He then entered the political arena actively, and was again, in 1856, elected

to Congress from his district; but before taking his seat he was elected by the Legislature to the United States Senate for a full term. There his career is accounted a most brilliant one. He grappled in debate with the ablest men of that body, and soon became the acknowledged spokesman and leader on the floor of the Senate for President Buchanan's administration. There he seemed to have full scope for his wonderful powers. Judge Bay, in his "Bench and Bar of Missouri," speaking of him and Douglas, says: "In a running debate they had no superiors, and when they came in conflict it was Greek meeting Greek." He acquired, perhaps, his greatest reputation in the debate with Douglas, in 1859, on the territorial or squatter sovereignty question. The late Mordecai Oliver, then a member of Congress from Missouri, was present at this debate, and related this incident in connection with the same. When it was known that Douglas was to speak on a certain day in advocacy of his favorite bill, the friends of the administration became solicitous as to who should reply to him. Mr. Green for a week had yielded to his unfortunate habit for drink, and seemed in no condition to meet the emergencies of the hour. They remonstrated with him; urged him by every possible persuasion they could bring to bear to induce him to straighten up. They even seriously considered the matter of taking physical charge of him, and thus guarding him against further indulgence. Green insisted on sitting in the Senate when Douglas opened the debate. The latter concluded his speech about three o'clock in the afternoon, when, to the surprise and amazement of Green's friends, he, instead of waiting until next day, as they supposed he would do, arose and made his celebrated reply. Oliver said that the impression made at the time was little short of that produced when Webster made his famous reply

to Hayne. The result was the "little giant" got the worst of it, and the administration was delighted.

Though Douglas lost the presidency in 1860, he triumphed over his old antagonist when he carried Missouri, the only State he did carry. In that campaign Green supported John C. Breckenridge, and lost. During that canvass, while speaking before a large audience at Fayette, Missouri, from the same platform with General John B. Clark, a brilliant advocate and politician, this incident occurred: Clark had made a speech in favor of Douglas, and then sat down. Green, in replying, made a statement which Clark dissented from by shaking his head. The keen eye of the speaker detected the movement, and he said: "The distinguished gentleman shakes his head. This reminds me of an incident that happened at a school I attended in old Virginia. One Monday morning a little girl came to school with her little brother; and, leading him up to the teacher, said that her mother asked her to tell him that Johnny had a habit of shaking his head, but he must not mind it,—there was nothing in it. Fellow-citizens, never mind about the General shaking his head,—there is nothing in it."

The Douglas wing of the Democracy having won in his State, and Green having lost prestige more or less by reason of his weakness for drink, it became apparent that the day of his political power was drawing to a close. Indeed before the next legislature convened to elect his successor to the United States Senate, it was a foregone conclusion that he would be defeated. Judge Waldo P. Johnson, an able jurist and a Douglas supporter, was therefore elected in the session of 1860-61. After the vote on the joint ballot was announced, by which Johnson was declared elected, he was called before the joint assembly, and in the presence of a large audi-

ence made the customary speech in acknowledgment of the honor conferred on him. But there was no enthusiasm manifested. Then it was that the ardent supporters of Green called for their favorite. Colonel N. C. Claiborne, himself a brilliant orator from the Old Dominion, and then a member of the legislature, who was present, in speaking of the occasion and of Green's speech, said he never heard it equalled by any one. For an hour he held the vast audience spell-bound by his matchless eloquence. He reviewed his own course in Congress, and delicately alluded to some of the causes which had led to his defeat. All the pent-up forces of his mighty nature seemed to be called out for this last supreme effort of his life. When he closed the effect was impressive indeed,—there was scarcely a dry eye in the assembly. Had the speech been made before the vote was taken, Claiborne said, "he believed no power on earth could have defeated him for reelection."

After this the war between the States quickly followed, and although Green strongly sympathized with the South in that great struggle, he took no part actively in the great contest. He seemed to be crushed in spirits, and led an aimless life for several years, spending most of his time in Washington. After the close of the war he located in St. Louis, and resumed the practice of law. While there, the late Samuel T. Glover, at the time one of the leaders of the St. Louis bar, relates of him this incident: Glover and other able attorneys were employed on the one side in a very important case in that city, wherein large interests, as well as intricate questions of law were involved, while Green alone appeared as attorney for the other side. The day for argument was set. For some two weeks prior Green could not be found at his office, and no one seemed to know where he was. On the



day the case was called he was absent, and the Court, impatient at this apparent neglect of his client's interest, absolutely issued an attachment for him. The officer appeared with him in court. Glover said his condition, as he almost staggered into court, was such as to excite his profound sympathy. The Court insisted that the argument proceed, and Glover and his associates spent several hours in the opening argument, presenting a vast array of authorities to sustain their contention. Mr. Green then arose to reply. At first he rambled somewhat ; but at length he seemed fully aroused, and made, said Glover, one of the finest legal arguments he ever heard in a case. Without referring to a single book, though a number of those used and cited lay upon the counsel table before him, he quoted from memory authority after authority, often *verbatim*. So unanswerable was his logic, so clear his reasoning, that he convinced the Court of the correctness of his conclusions, and won the case. Owing to his irregular habits, doubtless, his health failed, and he died in St. Louis, January, 19 1870.

Judge Wagner, for many years a distinguished member of the Supreme Court of Missouri, said of him : " Nature made him a great man, and one unusually fitted to be

a leader. His personal magnetism made him an orator, with scarce a peer." He classed him as next to Benton, the ablest statesman Missouri had ever put forth. Not only was he clear and forceful in argument before courts, but, as one who had often heard him said, " he could come as near making black appear white as any man in the world, when in his palmy days he appeared before juries." He was social in his nature, and never forgot a face or name.

In person he was tall and thin, and his commanding figure was such as to attract attention anywhere. With high cheek bones and large mouth, he was thought by those who had seen and heard Henry Clay to resemble the great Kentucky statesman, both in appearance and in manner of delivery. His clear, distinct enunciation and fascinating voice lent a charm to him as a speaker that was truly captivating to the listener.

That this able and brilliant man should have died so soon is to be regretted. That no stone or monument has ever been erected to his memory by the people of his adopted State is to their lasting discredit. To the credit of a noble daughter, be it said, a suitable monument has recently been placed at his grave.



**PUBLIC REFORM AND MUNICIPAL GOVERNMENT.**

BY DUANE MOWRY.

REFORM implies a change of, and an improvement on, existing conditions; and the significance of a reformatory movement is largely determined by the character of the forces which impel it. If the character of these forces is narrow and selfish and hypocritical, the real value of the results obtained will be doubtful, and, generally, unsatisfactory.

True reform, then, as applied to the public service may be somewhat loosely defined to be the best expression of an honest, persistent and intelligent effort to improve the social, economical and political conditions of the country. The very idea of reform, therefore, carries with it the implication that existing conditions are not perfect, and that the movement presumes to be an attempt to better or improve those conditions. Indeed, it can be safely asserted, and without danger of successful contradiction, that that human government which, in its own estimation, has passed the crucial point of amendment, and has reached a stage in its life amounting to practical perfection, has already entered upon the broad yet silent road which leads to ultimate national decay. Even now it may be dangerously near the point of certain dissolution. Genuine reform in the affairs of government, therefore, is the sure sign of certain progress in the State, and in its people.

It is not probable that there will be much material difference of opinion on what has already been said. It will be taken for granted that real reform is the index finger which points to the means whereby a better condition of human affairs, under governmental dictation, is possible. A variance appears as soon as an attempt is made to

cause a reformatory movement to become operative, to pronounce, so to speak, adverse judgment on the present status of things, and to undertake to apply what is conceived to be the proper corrective, or to enter upon the study of the details which it is thought the existing conditions of public affairs present, for the avowed purpose of applying what is believed to be the appropriate remedy. It is not surprising that this difference exists, nor can it be regarded as unfortunate. For, in a representative form of government, the test of the intrinsic value of any political or economical tenet or dogma, or of an effort to improve the conditions which at present exist, must come after an examination has been made at the bar of public opinion, and its certain verdict rendered. To say that such verdict is not always just or right, is simply to say that majorities may sometimes be mistaken or wrong, and that human nature is not infallible.

Now it is requisite to the advancement of the cause of public reform that those who participate in the movement come to it with clean hands and a thoroughly unselfish purpose. One of the reasons why the average reform movement is so odious to the thinking masses comes from the fact that its friends are not genuine, and are acting from purely mercenary motives. It would be a lasting shame and an awful disgrace to give popular support to a measure that had for its chief champions and promoters those who were not sincerely imbued with its spirit, and who were seeking merely to hoodwink the public and to allay popular discontent and restlessness. The true reformer must possess qualities of the highest order of merit. He must lose sight of all mere

petty, personal advantage as a moving force, and address himself, patiently, to the task before him, with his mind's eye centered solely on the advancement of the common weal.

It is undoubtedly true that self-aggrandizement is an ever-present, active agent, which is constantly swaying the passions and motives of human action. But it can hardly be regarded as the best guaranty for faithful work in the true reformer. And we cannot be sure that it marks, in the better sense at least, the true reformer at all. Indeed, the better opinion seems to be, that the true reformer should prosecute his work with the sole ultimate purpose of advancing the social and political conditions of the masses, with no attendant thought of the resulting advantage or disadvantage to himself. This is, of course, unselfish devotion to one's highest political duty, and is patriotism in the best conceivable sense. If the ostensible champions of reformatory movements were more generally of this unselfish kind, they would be able to enlist a far larger and worthier support of such movements among a class now lukewarm, if not, indeed, actively opposed to them. It is becoming more and more difficult to deceive the intelligent common people with high-sounding but hollow platitudes; and those who say that they stand for political ideas of a certain cast, as well as those who make political promises, must supplement such ideas and promises with lives and conduct which shall give ample warrant for public confidence. It is possible, in this way, to make some real progress in genuine public reform.

An unselfish and honest purpose is not the only requisite for the reformer. A wise judgment must dictate his actions as well. Reforms should never be attempted for the mere sake of change from present conditions. Intelligence of a most lofty and pronounced

type should attend every endeavor to improve the public service.

The antagonism which any attempt at reform arouses is always so intense, and the interests which are to be affected are so jealous, that great courage is required of those who undertake it. None but the brave have any business to engage in the work of reform. But who would admit that he is not courageous? Nevertheless, it is believed that few have the courage and independence of Ralph Waldo Emerson, who, in 1837, dared to withdraw from the church because of its avowed support of slavery, and who at that time stated that "if a single man plant himself indomitably on his instincts and there abide, the world will come round to him." Not a few of the failures of reform movements are due to the cowardice of the people, the fear that participation in meritorious public reform may cost the citizen a loss of position or dollars, or other personal advantage. In spite of this, however, it is the firm belief that the public conscience is generally sound. It would be little less than calamitous for republican institutions if this were not so.

There can be no warrant for hope for the success of permanent reform unless the incorruptible methods of integrity are invoked. Reform and integrity are so closely related that the one cannot exist and flourish without the other. They are, practically, "one and inseparable." The reformer can do much effective work along educational lines. This can be accomplished through a healthy public opinion, propagated and sustained through the press and on the rostrum. It is one of the surest, as it is also one of the safest, guarantees of the inalienable rights of the people. If it is not so there is something wrong, radically wrong, with the tastes and desires of the public who make this opinion. But a movement for reform is usually di-

rected against existing evils and abuses, rather than in favor of the formation of new schemes to wipe them out. A genuine reform stands committed to the cardinal idea of making public affairs cleaner and purer, as they are found at the time of making the effort, and incidentally of providing better ways and means of obtaining and retaining the same. Public reform, then, may be said to be but another name for cleaner and better social and economical conditions in governmental affairs.

Organized effort is one of the most effective means of accomplishing practical reform. This is preëminently true of municipal reform. To be of any real value, however, it must be more than a negative force. It must be positive and aggressive in its methods, and in its demands. Emphasizing the existence of an abuse in the municipal service is not enough. An unequivocal demand for its eradication must also follow.

Organized municipal reform which appeals to a class, or to several classes, and which adopts as a cardinal principle and moving force the lessening of the burden of taxation in the city, will hardly meet with much success. The basis of such a reform movement is essentially selfish and narrow. It is impelled by wrong motives. It appeals, mainly, to those who bear the burdens of taxation, generally the wealthier class. Public economy with this class is synonymous to reduced taxation. As a purely business proposition this may sound well enough. But does a genuine reform movement contemplate an appeal to the pockets of its friends as a sole, or chief, mainspring for its life and action? Is it at all certain that a better, cleaner, or cheaper, municipal government is to be secured because it may cost less for the time being? And does not an appeal for reform, based on such a low moral plane, tend to discount, if not degrade, all

sincere efforts for better municipal government?

Public reform, in order that it may be even tolerably successful, must be a popular movement and awaken general interest. To do this it must take up matters which vitally concern *all* the people, or practically all the people. The organized effort must leave an indelible impress on the public pulse. It must enlist the active support of the common people, of those who are considered as occupying stations in the commoner walks of life. Their motives are less apt to be influenced by hopes of immediate gains or losses, are purer and higher, if you please, than are those of the active, busy man of large financial interests. It is the common people who are, after all, the conservators of the rights of all the people. A reform movement which ignores, or undervalues, this vital democratic principle will be apt to sound the tocsin of reform to little purpose, yet, perhaps, "keeping the word of promise to our ear, and breaking it to our hope."

It has been said that organized reform must watch at long range, from the clouds, so to speak, any attempt at evil-doing on the part of the servants of the municipality. The clearer vision of the eagle eye of the vultures, who are supposed to be the conservators of purity in official life, can, it is argued, at the greater distance, scent any misfeasance or malfeasance, with greater precision and prevision, and also avoid contamination of the pure white garments of the watchers with the slime and the filth and the rot present in the city's official sea. This policy, it is urged, would induce all the wealth, and all the culture, and the best (?) theoretical reformers to assist in the work so auspiciously (?) begun. But such a course is repugnant to the very idea of reform. It is un-American. True reform knows no class, no sect, no party. It is a cosmopolitan. The

method above indicated belongs to hypocrites, scheming political tricksters and knaves. Unless we are ready to admit that a representative form of government is a failure, and the political arena an unfit place for every patriotic citizen, then it is contended that the very place to accomplish the results which an honest reform contemplates is in those places where the effective weapons are to be found, viz., in the world of practical politics, at the polls, in the caucuses and the primaries, in the partisan press, and on the stump. Make these places better by reason of your identification with them, and make the results better by reason of your honorable participation in the contests. The better element, by which is meant the more patriotic citizens everywhere, is coming to recognize the importance of active, organized effort in the political arena. In this way it is possible to meet and defeat a common enemy of good government. It seems to be one of the most important and effective steps towards better municipal government.

Every sincere attempt at honest reform has its useful office. For it provokes the very criticism out of which comes, or may come, an agitation which frequently culminates in the correction of abuses and the redress of grievances. Agitation, but not annihilation, is the one sure rock on which is builded the perpetuity of worthy American institutions.

The best governed city is that one which derives its power from the consent of the governed. This should be interpreted to mean that the best governed city is that one which is actually "governed" least, and in which the means of government are entrusted to its servants by the active participation of all its citizens, and especially of all of its good citizens. If this policy had been pursued in the past there would have been small need for the cry for true reform in our large

cities. The difficulty has confronted us too often that those citizens best fitted for the duties of self-government have neglected and declined to take an active part in the affairs of the city, giving as a reason therefor that they regarded such participation as dishonorable and degrading. The writer has no sympathy with such an un-American and unworthy sentiment. The citizens who utter it are not entitled to the blessings of a free government. They should go to "the man without a country." In a democracy, such views are wholly unwarranted and unjustifiable. If conditions are so bad, it is the duty of good citizens to make them better. This is the price of representative government.

It must be clear to the reader by this time that the argument of this paper holds that the initiatory movement to advance the condition of the affairs of government must come, primarily, from active participation in the field of practical politics. Every citizen should be a politician in the best sense. Our form of government demands this. It is the price of liberty. And liberty demands of us vigilance, and vigilance implies activity, and activity contemplates and includes participation. A genuine reform movement is emphatically and preëminently the cause of the masses, and its worth should be emphasized by doing something, and by doing that something promptly, energetically, efficiently. And there need be "no cessation of hostilities." There is always something to be done to improve the situation in public affairs and particularly in municipal affairs.

The argument of this paper may be thus summarized :

First : True reform in the public service is better government as the objective point.

Second : All people desire to have good government.

Third : Selfishness, in some of its many forms, begets bad government.

Fourth : As all people desire good government, and as public reform is an effort for good government, therefore, in a republican form of government, where all governmental power, in theory at least, is obtained from the consent of the governed, all reformatory movements must get their inspiration and momentum from the people.

Fifth : The effective method of accomplishing real reform in a representative form of government, therefore, is by direct appeal to the public conscience, primarily at the caucus and at the polls, and secondarily through the press and on the rostrum.

Sixth : An unselfish and patriotic spirit, as well as wisdom, courage and integrity, must characterize and be prominent in the qualifications of the true reformer.

Seventh : Many meritorious reforms are inaugurated, which become odious to their friends because of the insincerity and duplicity of some of the would-be promoters of the same. Hence it is of the very first importance that a reform movement ally itself with genuine friends of unquestioned motives and altogether above suspicion ; and this alliance should begin with the inception of the proposed movement.

Eighth : Organized municipal reform, while ostensibly seeking better municipal government, sometimes recognizes the most objectionable features of selfishness, seeks to obtain relief without any organized or sys-

tematic appeal to the masses, abstains from the field of practical politics in the best sense, declines to do any detailed work, and makes municipal reform odious by reason of the undoubted duplicity of some of its more prominent spirits who "manage" it, thus stamping it as unworthy of popular support or confidence.

Finally : The legitimate province of a municipal reform movement includes the study of the various problems which are engaging public attention. A partial list of subjects would include street railway systems, steam railroad lines, electric lighting and gas plants, water-works, telegraph and telephone lines, conduct and management of hospitals, libraries, reading-rooms, art-galleries, public baths and amusements, methods of letting and getting contracts for public work, investigation of the manner in which official duty is discharged, and many other questions which will suggest themselves as the work continues. And this movement implies not only a study of municipal questions, but also the pushing into public notice the result of important investigations which the facts seem to warrant, supplemented, in some cases, perhaps, by suggestions and recommendations looking to the more efficient administration of the municipal government. In this way the municipal reform movement awakens the intelligent interest of the people and becomes the people's movement.



## THE KIDNAPPING OF THE PRESIDENT.

By J. H. ROCKWELL.

CAPTAIN THOMAS C. COLEMAN, who died some months ago in Louisville, Ky., had the distinction of being the only man in the world who ever kidnapped a President of the United States. Coleman was one of the old-time Mississippi river steamboat captains, and the remarkable incident that gave him a reputation from Louisville to New Orleans, occurred at the close of the Mexican war, when Zachary Taylor was President. In those days railroads were few, and the Mississippi was the great highway of travel. Naturally there was intense rivalry between steamboat men, and Coleman's exploit brought thousands of dollars to him and his brothers, and established their line of steamers as the foremost in the river trade. They were the big floating palaces of that day plying between Louisville and New Orleans and the pride of the lot was the "Saladin." Nothing on the two rivers could beat her when Captain Coleman chose to turn her loose. There was a boat belonging to a rival line that occasionally disputed with the "Saladin" the sway of the river, but was always beaten.

President Taylor was on his famous tour of the country. To command the boat that carried him on the Mississippi was an honor coveted by all the captains. Old "Rough and Ready" was a Kentuckian and a warm friend of the Colemans, so they expected, of course, to be chosen for the honor of carrying the President. But the wishes of General Taylor were not consulted. He was at Vicksburg, Miss., and the reception committee there decided that the rival boat should carry him up to Memphis. When the word came to New Orleans, where the two boats were tied up, the disappointment on the "Saladin"

was the more intense as it was the loss of what they had thought a sure thing, while the joy on the rival boat was the greater from the unexpectedness of the victory. Big monsters of gloom and joy, the two steamers pulled away from the New Orleans dock side by side.

"Any way, boys, we'll show them that the 'Saladin' is the best boat," said Captain Coleman, and his crew answered him with a will.

The "Saladin" soon began to draw ahead. Then, under a full head of steam, lickety-split, up the river they came, and the people along the levees and the hands in the fields stopped to watch and wonder, for they had never before seen two boats going up the river at that speed. But every landing for the "Saladin" was a winning one. The entire city of Vicksburg was gathered on the bluff to see the President off. The big old soldier stood in the midst of the escort committee, growling and bowing, for he was heartily tired of so much ceremony and awaited anxiously the coming of the boat that was to take him to Memphis. At last, far down the river, could be seen the twin puffs of a hard-driven steamer.

"There she comes! There she comes!" yelled the crowd, and began cheering the President off.

Puffing and groaning the big river greyhound rushed up to the dock; the gang-plank came down in an instant. She was right under the bluff, and the people above could only look down on her deck, and they were all shouting and cheering as the President and his escort went aboard. As soon as the party was on the boat they went forward to the cabin, and then, as if by magic,

without waiting to unload the cargo, the big flyer tore away from the dock at the top of its speed. As she straightened out in the stream and began pounding away for Memphis under full pressure, the smoke of another steamer, desperately driven, came to sight around the last bend in the river.

They had been gone something like half an hour when the escort committee sent for the captain of the boat.

"I'll call Captain Coleman," replied the mate.

"Captain Coleman?" asked the leader of the escort committee. "Why, what boat is this?"

"The 'Saladin,' bound for Louisville," came the prompt response.

"My God! Stop the boat! Turn around! Stop, quick! Here, all of you, we are on the wrong boat."

"Who? What? What is it?" cried the other members of the committee, as they came running up.

"We are on the wrong boat," and at that the committee in a body rushed for Coleman, who appeared in the midst of the excited men.

"Is there anything I can do for you, gentlemen?" He was the only cool man in the lot. They pressed about him. The cabin was loud with their oaths, demands and denunciations. But Coleman remained calm and unruffled. Then the escort went crazy. They drew their pistols and threatened the captain with personal violence.

"Do you know, sir," cried one excited man, shaking his pistol in the face of the smiling captain, "do you know, sir, what you are doing? You are kidnapping the President of the United States."

"And do you know, sir," retorted Coleman, "that the President of the United States is riding on my boat without my invitation and without my permission?"

The escort committee could make no reply, — there was nothing to say.

"He came on here," continued the captain, "of his own free will and accord, and, certainly, I am not going to put the President of the United States off my boat unless he asks to be put off. Now, gentlemen, there are only two men in the world who can stop this boat — the President and myself. I won't stop her. It's up to the President."

The committee fell back. They might kill the captain, but that would not stop the boat. Then they went to General Taylor. The President came out looking very solemn.

"Tom," he began, and walking up to him he shook his finger in Captain Coleman's face. "Tom, you scamp, what do you mean by getting me into this?"

Then he turned to the angry, sulky committee: "Gentlemen, I reckon about all we can do now is to take a drink."

And thus ended the kidnapping of the President of the United States — an incident much talked of in steamboat circles at the time, but never generally known until now.





## THE SAINTE CROIX-DE BRINVILLIERS CASE.

BY H. GERALD CHAPIN.

ON a fine autumn evening in the year of our Lord, 1665, the gates of the Bastille swung open to receive a new prisoner. Under arches and through passageways the carriage rolled, and crossing the main courtyard came to a halt before the prison office. The guards quickly ushered into the presence of the Governor a young and handsome officer, of perhaps twenty-eight or thirty, in the uniform of a captain of cavalry. The necessary formalities were soon over, and the name of the new arrival duly entered on the prison register — Gaudin de Sainte Croix. The assignment of a cell was, however, a question not so easily disposed of. The reign of a Richelieu and a Mazarin, followed by that of the fourteenth Louis, had sufficed to fill the ancient fortress to overflowing.

"There is no way out of the difficulty, Monsieur le Chevalier," observed the Governor, with a certain amount of politeness extorted by the prisoner's well-known rank, "but to place you in a cell already occupied. Let us see," again turning the leaves of the register. "No, a separate room is out of the question." Addressing a warder: "The prisoner will be placed with Exili."

It was thus that fate had written the prologue to a series of crimes destined to spread overmastering fear and suspicion throughout the length and breadth of seventeenth century France.

The Chevalier Gaudin de Sainte Croix was reputed to be of noble family, though his own escutcheon bore, perforce, the bar sinister. While serving as captain in the regiment of Tracy, he had become the intimate friend of a brother officer, the Marquis de Brinvilliers, colonel of the Normandy corps. That an introduction should follow to Madame la

Marquise, was natural; — that Sainte Croix should become the paramour of his friend's wife was not to be wondered at, when the character of each was considered. De Brinvilliers, himself a man of notoriously licentious life, was utterly indifferent to the entire proceeding.

Monsieur de Dreux d'Aubray, Civil Lieutenant at the Châtelet de Paris, father of the Marquise, and a man of almost Puritanical rigidity of character, chose to view the subject in a different light. Remonstrance having been tried, with no avail, and as the relations of the Marquise with Sainte Croix were fast becoming notorious, he procured the issuance of a *lettre de cachet*. Under it thê Chevalier was arrested while in the very carriage of Madame de Brinvilliers.

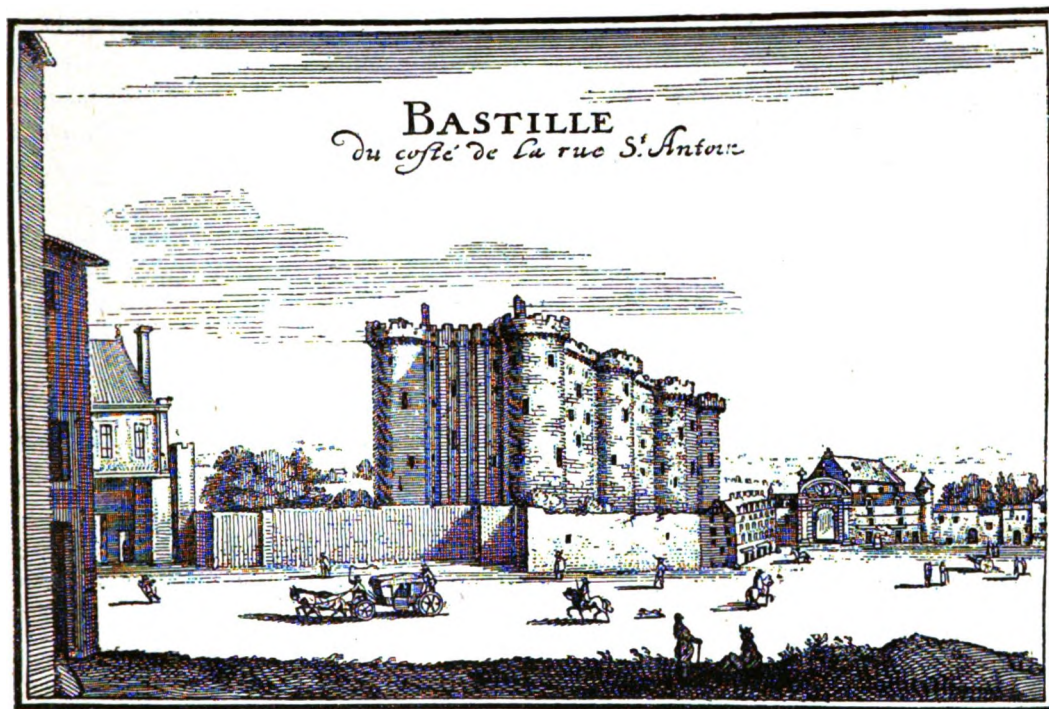
Of all the prisoners which the Bastille had held, or was destined to contain, it is doubtful whether any exceeded in utter depravity the Italian Exili. Italy, since the days of the Borgias, had been a perfect school of poisoning, but never had the practice become so widespread as toward the latter half of the seventeenth century. That epoch witnessed the invention of the deadly liquid of Tofana, openly offered for sale as "Manna of St. Nicholas of Bari." The formula has been lost long since, but it is thought to have been a strong solution of arsenic. Tofana herself confessed its deadly work in over six hundred cases. In about the year 1659 it was that the "league of young wives with old husbands" was discovered, presided over by La Spara.

Exili had been driven from Rome under the suspicion of being closely connected with that band of poisoners which under Innocent X. are said to have caused the death of over

one hundred and fifty persons. The French authorities appear to have regarded him as altogether too dangerous an individual to be permitted to remain at large, for shortly after his arrival in Paris he was arrested under a *lettre de cachet*. He had been in the Bastille for nearly six months when Sainte Croix was committed.

led to the assassination of the father of Madame de Brinvilliers.

Immediately upon leaving the Bastille, Sainte Croix, in the name of his intendent, Martin de Breuille, leased a small apartment which he used as a laboratory. Here he was rejoined by Exili who was released shortly after. Whether the Marquis was an



THE BASTILLE.

A year, later when Sainte Croix was released, he knew everything that Exili could teach. The pupil was beginning to excel the master.

The interrupted relations with Madame de Brinvilliers were resumed, this time with more caution. The peril of another of old d'Aubray's *lettres de cachet* was continually hanging over the lovers. Their extravagances soon resulted in the piling up of vast debts, payment of which was out of the question. Such were the motives which

accomplice in the murder of his father-in-law has always remained somewhat of an open question. Presumptions, however, are strongly in his favor. His faults, and they were many, were those of the epoch of a la Vallière or a de Montespan. Nothing indicates that there existed the deliberate and cold-blooded cruelty inherent in his wife.

Lest there should be any possibility of failure, it was resolved to make certain experiments. Madame de Brinvilliers, who had always great respect for religion, at least in

its outward manifestations, was in the habit of visiting the hospitals, bringing soups and cordials. It was noticed about this time, that a number of patients at the Hôtel Dieu, in whom she took special interest, suddenly died. To her maid Françoise Roussel she one day gave a slice of ham and some gooseberry preserves. Almost immediately the girl was seized with severe cramps, feeling, as she subsequently testified, "as though her heart had been pierced." She recovered, however.

When d'Aubray left Paris for his Château of Offemont for the purpose of transacting certain business relative to the estate, he was accompanied by his daughter. For eight months previous, she had been administering in small doses the poison given her by Sainte Croix. This was in all probability, *aqua tofana*, as has been seen, a strong solution of arsenic. The design was to undermine the victim's constitution, an end which it apparently failed to accomplish. Sainte Croix and the Marquise had become impatient, and it was resolved that the Civil Lieutenant should not return alive. The task proved surprisingly free from difficulty. On the second night after his arrival, he was attacked with terrific vomitings accompanied by frightful agony. Madame la Marquise had prepared the soup eaten at dinner. Offemont was an ideal spot for the commission of such a crime. "Situated," as Dumas puts it, "in the centre of the forest of Aigue, at three or four leagues distance from Compiègne, the poison had already made such violent progress when succor came as to render the latter useless." As a matter of fact when the physician arrived from Compiègne, his diagnosis revealed nothing more important than an attack of indigestion, and the patient was treated accordingly. At the solicitation of the Marquise, anxious to complicate matters by a substitution of physicians, her father, a dying

man, was removed to Paris. Here, after lingering in agony a few days, he expired. As the victim was supposed to have died a natural death no autopsy was made. For the moment the crime remained undiscovered.

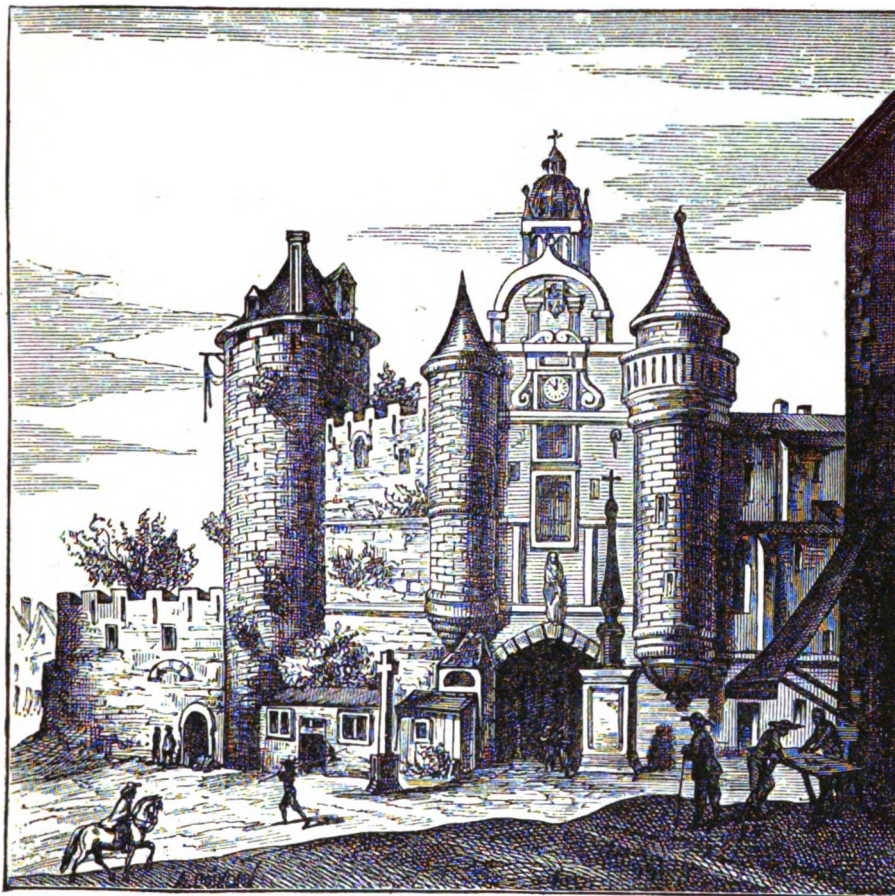
Still, the result was not as satisfactory as had been expected. The larger part, in fact almost the entirety, of the paternal estate was bequeathed to the brothers of the Marquise. One was, as his father had been, a Civil Lieutenant, the other a Counsellor of Parliament. In the place of one guardian, she had now found two. Such a state of affairs was insufferable. Their deaths were determined on.

All this time Sainte Croix was living a life of the greatest splendor, though the source of his wealth was unknown. The Chevalier was a man of a remarkable degree of brilliancy, and few suspected that he followed the profession (if such it may be called) of a traf-ficker in poisons. One Jean Amelin, called La Chaussée, a lackey in his service, was selected as a fitting instrument with which to execute the crime.

It is exceedingly unfortunate that there should exist a tendency to surround the perpetrator of a great crime with a halo of romance. The community cherishes its illusions, and woe to the reckless historian who dares to present a Dick Turpin or a Claude Duval other than as the dashing gallant who courteously took from the rich what they could well afford to lose, who royally spent what was bravely taken, and who, after having fought against tremendous odds, was finally captured and put to a highly spectacular death before an admiring assemblage. Posterity might have forgiven much had Sainte Croix been, as he is sometimes represented, the true and faithful lover of the Marquise for whose sake the crimes had been committed. Nothing can be pardoned in the paid assassin, careful to exact the stipulated

fee for the performance of his deadly work. Such was the Chevalier. He was undoubtedly beloved by the Marquise, so far at least as such a sensuist was capable of loving anyone. On several occasions she requested

would be difficult to find. Eight days only after the death of the elder brother,—the Civil Lieutenant,—on the 20th of June, 1670, was a bond signed by Madame for the sum of thirty thousand livres. It cer-



THE GREAT CHÂTELET OF PARIS.

from him poisons to be administered to her husband. These he gave her, probably fearing to refuse, and then was exceedingly careful to quietly present the aforesaid husband with an antidote,—lest in the future an obligation to marry the widow should arise. Truly the delicate humor of this situation has seldom been paralleled. A more obliging lover and complaisant husband

tainly cannot be said that the disciple of Exili was inclined to undervalue his services.

La Chaussée then left the employ of Sainte Croix, and three months afterwards entered that of the Counsellor d'Aubray. As the brothers lived together, opportunities for a double poisoning were not lacking. La Chaussée was faithful to his employers. One day, while waiting at table, he put the poison



in a glass of wine and presented it to the Civil Lieutenant. The dose was so strong that the latter immediately perceived that the wine had been tampered with. Suspecting the truth, he arose from table crying, "Brother, your valet is trying to poison me. Taste this!" La Chaussée quickly seized the glass, saying that by mistake he had used one containing a few drops of medicine left by one of the servants who had been ill. As the lieutenant had drank but little of the mixture, the explanation was accepted. The incident accordingly passed off without further comment, although the victim, we are informed, was slightly unwell.

After this check, it was not deemed advisable to make another effort in the near future, and three months were permitted to elapse. Finally, in April, 1670, while the brothers were passing the Easter vacation at Villequoy, in Beauce, La Chaussée received instructions to administer another dose. This time it was determined to make sure, even at the expense of a number of lives. The treacherous valet accordingly placed the poison in a pigeon pie. After dinner, three of the guests who had abstained from eating it suffered no harm. Seven who had partaken became ill. A peculiarity of the case is found in the fact that although these seven suffered greatly, the only deaths were those of the two brothers. The lieutenant, whose constitution may have been undermined by the poison already taken, experienced frightful agony. He returned from Villequoy a dying man, and expired during the following June. Monsieur d'Aubray, Counsellor, resisted the effects of the poison for a longer time. It is probable indeed that La Chaussée took occasion to administer it on several other occasions. D'Aubray died at last in the midst of dreadful suffering.

So many deaths in one family, under such

circumstances, naturally aroused suspicion, and an autopsy was held. The liver, stomach and intestines were found to present unequivocal signs of poisoning, though the physicians were careful to add that it sometimes happens that cacaemia produces the same effects.

The grief of Madame de Brinvilliers was in appearance so sincere that she would have been the last person suspected. As for La Chaussée, this bravo had managed affairs with so much address as to completely gain the good graces of his late master, who had even left him a small legacy. From Sainte Croix he received a hundred pistoles with promise of perpetual employment as confidential valet.

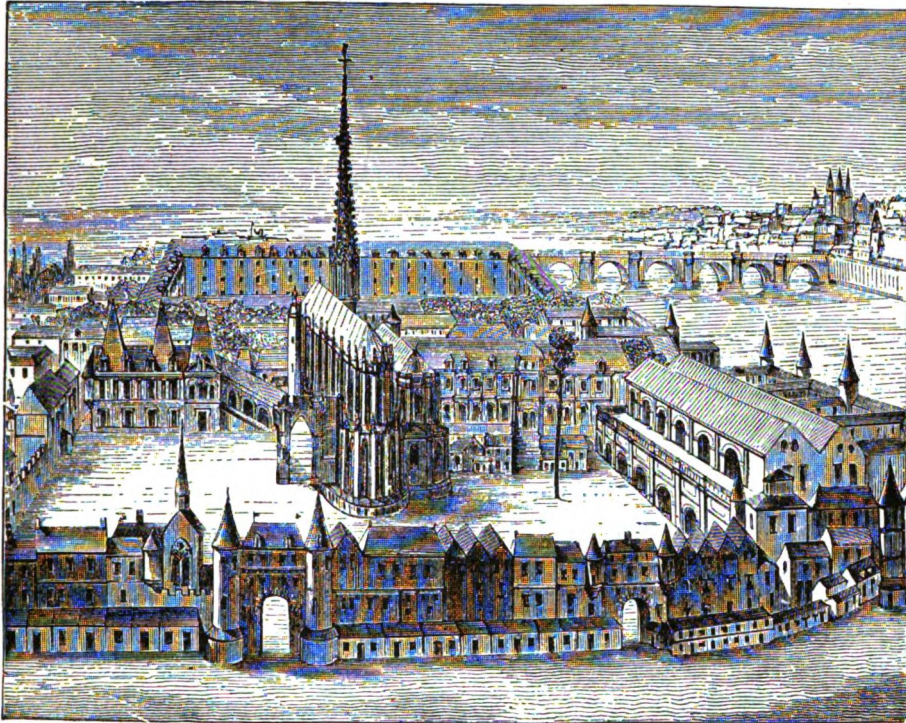
Up to this point everything had been successful, though, looking at the matter from a critical standpoint, it cannot be said that the affair had been managed with any great degree of dexterity. The physician of the day had but slight smattering of toxicology, and was liable to be baffled by poisons which any tyro could now detect. The lovers were preparing to enjoy their hardly gained repose, when an event occurred, impossible to have foreseen, which served to bring everything to light. This was no less than the sudden death of Sainte Croix.

For some time previous to this decease, that soldier of fortune, as has been said, appears to have regularly taken upon himself the career of a paid bravo. In all probability he was largely responsible for a number of mysterious deaths among the noblesse which shocked Paris about that time. The *poudre de succession*, or "succession powder," was an actuality as well as subject for jest.

A client of Sainte Croix (if the expression may be pardoned) was one Reich de Penautier, a man of great influence at court. Although subsequently acquitted when brought to trial, there are excellent grounds for be-

lieving that, in four instances at least, he availed himself of his friend's scientific acquirements. The Sieur de Saint Laurent, incumbent of an office which Penautier greatly desired and afterwards obtained, died suddenly under circumstances so peculiar as to warrant the holding of an autopsy. The

mons from earth, the climax would scarcely have been more dramatic. It was in the room in the Rue des Bernardins, rented upon leaving the Bastille, that the end came. While engaged in preparing a poison of a high degree of virulence, the glass mask which he wore slipped from his face, and was smashed



THE PALACE OF PARIS AS IT WAS IN THE SIXTEENTH CENTURY. THE CONCIERGERIE  
— THE PRISON OF THE PALACE — WAS SITUATED UNDER THE  
THREE ROUND TOWERS AT THE RIGHT.

same conditions were found to exist as in the cases of the brothers d'Aubray. It is worthy of remark that the deceased had in his service one Georges, a dismissed valet of Sainte Croix.

But the career of the Chevalier had now reached its close. Had Sainte Croix, Faust-like, actually disposed of his immortal soul, as was popularly believed at that time, and at the appointed hour had received his sum-

to atoms. The Chevalier inhaled the noxious fumes, and fell to the floor a corpse.<sup>1</sup>

<sup>1</sup> This is but one of the versions of the death of Sainte Croix. It is taken from the briefs for the prosecution in the trial of the Marquise, and the defendant appears to have conceded its truth, though the language is by no means clear. Messrs. Garanger and Vauthier, prosecuting attorney and counsel respectively, in their brief against Penautier on the trial of the latter, assert that Sainte Croix died after a malady of five months caused by the same means. It is scarcely probable, however, that this is true. With five months at his disposal is it likely that the Chevalier would have allowed the compromising documents to remain in existence?

Even now, it is highly probable that the truth would have remained undiscovered had the cupidity of La Chaussée been less, and the self-control of the Marquise greater. As was the custom, seals were immediately placed upon the effects of the deceased. This was done on the thirtieth of July, 1672. La Chaussée, thinking this an excellent opportunity for enrichment, immediately made formal demand upon the officers having charge of the estate for various sums claimed to have been deposited with Sainte Croix. Among these were a certain hundred pistoles contained in a cloth bag kept in a particular cabinet — in all probability his fee for the poisoning of the brothers d'Aubray. He was told to wait until the seals were taken off, when, if he could prove ownership, the property would be rendered to him. The fact that so large an amount should be due to a mere lackey, even though he had been (as he asserted) seven years in the service of his master, naturally aroused comment. It was observed that, as a portion of that time, he evidently counted the period passed with the Counsellor d'Aubray.

But if the conduct of La Chaussée provoked comment, that of the Marquise aroused positive suspicion. The rumor of the Chevalier's death had been quickly spread abroad. Upon hearing the news, though it was then ten o'clock in the evening, she immediately rushed to the house of Commissioner Picard, who was charged with the *affaire Sainte Croix*, and breathlessly demanded that a certain box, of which with its contents, she claimed to be the owner, should be delivered to her unopened. She was informed that the officer in question had retired for the evening, and could not be disturbed. On the next morning, she sent a messenger who offered the Commissioner fifty louis, if he would deliver up the box. This was refused, and it was explained that nothing could be done before

the removal of the seals. The same evening, panic-stricken, she fled to London. After remaining there for but a few weeks, she went to Germany, and from thence to the Low Countries, finally taking refuge in a convent at Liège.

On the eighth of August the seals were publicly removed. The Marquise appeared by counsel, and had the following declaration inserted in the *procès-verbal*:

"Then appeared Alexandre Delamarre, procureur of Madame de Brinvilliers, who made formal declaration that, if, in the said box (the ownership of which is claimed by his client) there is found a bond (*une promesse*) signed by her, for the sum of thirty thousand livres, it is a document that has been obtained from her by surprise, and in case her signature should be found genuine, she gives notice of her intention to bring suit to have the instrument declared void. (*C'est une pièce qui a été surprise d'elle et contre laquelle en cas que sa signature soit véritable, elle étend se pourvoir pour la faire déclarer nulle.*)"

This formality having been completed, the officers proceeded to an examination of the Sainte Croix papers. Among the first discovered was a document entitled "My confession." As there then existed no positive suspicion as to the Chevalier's criminality, the paper was regarded as of too high a degree of privacy to permit of inspection, and under that unfortunate belief was burned unread.

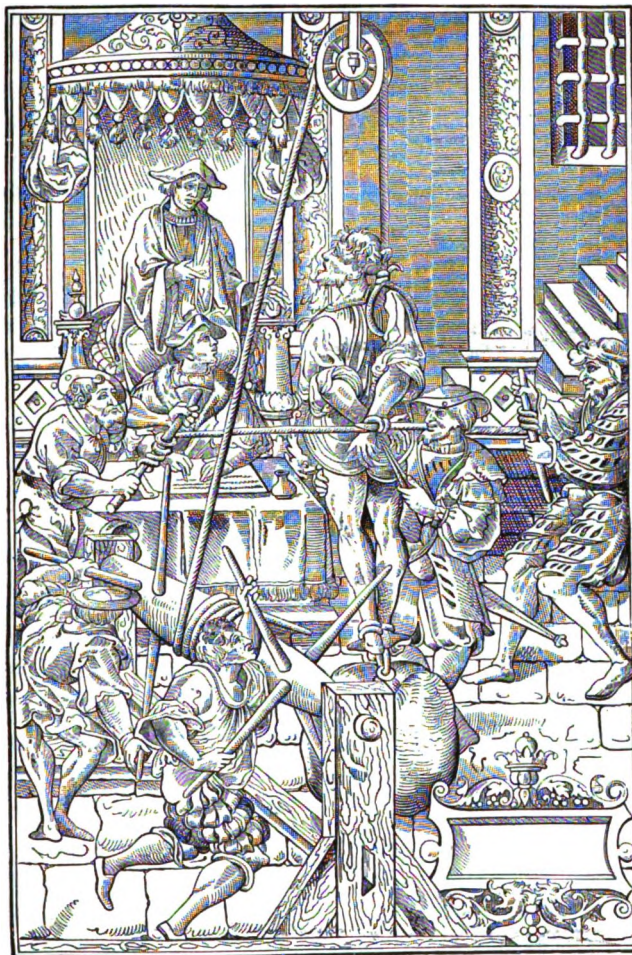
The insistence of the Marquise had served to arouse considerable curiosity as to the little box, and it was soon opened. The officers found it filled with documents and sealed packages. The first examined was entitled "My Will." In it Sainte Croix asked that box and contents be delivered to Madame de Brinvilliers. In case of her predecease, everything was to be burned unopened. At the end were written these words, "There is



a single package addressed to M. Penautier which should be given him."

The packages were opened, and found to contain poisons of various kinds. There

The authorities now became aware of the fact that great crimes had been committed, though even with all this evidence at hand it was deemed best to proceed with great cau-



### THE QUESTION EXTRAORDINARY.

were also some thirty-six letters written to the deceased by the Marquise, together with two bonds, one of Madame de Brinvilliers, the other of the Sieur de Penautier. The first was for thirty thousand, the second for ten thousand livres. One corresponded in date to the death of d'Aubray, the other to that of Saint Laurent.

tion. Both Penautier and Madame de Brinvilliers were of too high a rank to be lightly attacked. This objection, however, did not apply to La Chaussée.

The widow of the Civil Lieutenant was a woman of great force of character. She had been greatly attached to her husband, and, convinced that there had been foul play, was



bent upon avenging his death. Upon her application a warrant was issued, and the valet was arrested.

Upon his trial, had at the Châtelet, the judges were of the opinion that sufficient proofs of guilt had not been shown. In accordance with the system then in force, he was condemned to the torture preliminary in order to extort evidence against himself. Knowing that if they could only endure the torment long enough without confessing, their subsequent acquittal was assured, criminals would very often undergo this ordeal without revealing anything. That this avenue of escape might not be open to La Chaussée, the prosecutrix appealed. Her plea was sustained, and the appellate tribunal decreed "Jean Amelin, called La Chaussée, proved and convicted of having poisoned the late Civil Lieutenant and the Counsellor. For this he is condemned to be broken on the wheel, first being put to the torture ordinary and extraordinary to force a revelation of his accomplices."

The torment selected was that of the boot, and the legs and feet of La Chaussée were crushed between planks. With half the allotted amount of pain yet uninflicted, the wretched valet gave way. Stretched on a mattress in the torture chamber, he made full confession. A short time afterward he suffered death on the Place de Grève, as prescribed in the sentence. After having been bound to a wheel, his legs and arms were broken with an iron bar. In this condition he received the *coup de grace*.

Before proceeding further, it may be well to remark that Penautier was acquitted at his subsequent trial. He was a man of too great utility to Prime Minister Colbert to permit of his conviction. As for Exili, he appears to have vanished from off the face of the earth. No trace of him was ever discovered.

It was now the turn of the Marquise de

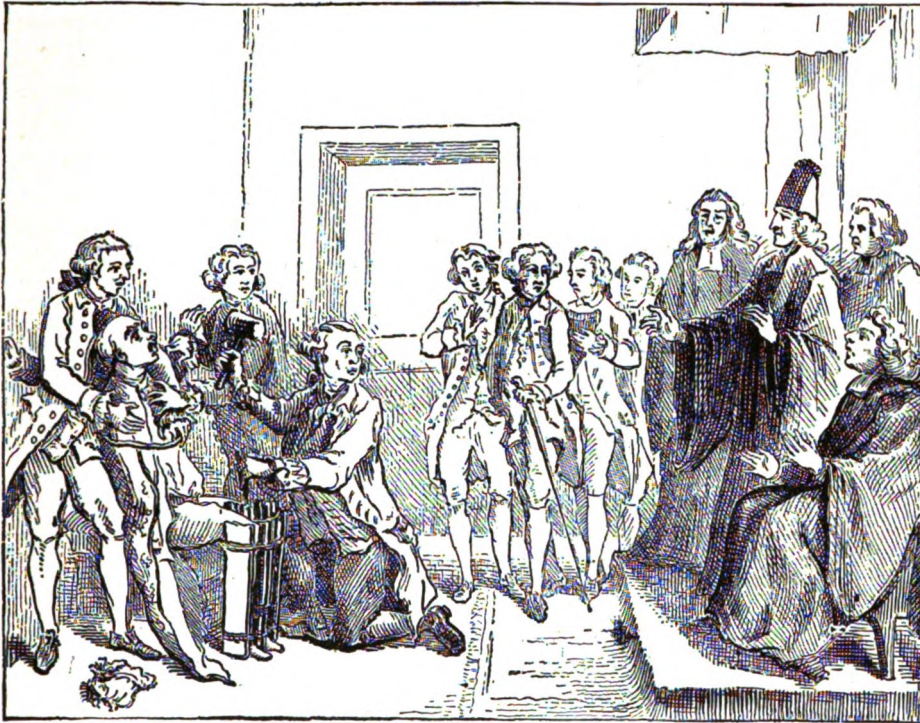
Brinvilliers. As has been seen, she was in sanctuary at Liège. For Sainte Croix, dead, she had quickly consoled herself. One Théria, of whom but little is known, now occupied first place in her affections. The task of arresting the criminal was assigned to Desgrais, one of the most skillful of the police. Disguised as an abbé, he visited the Marquise, and succeeded in ingratiating himself into her confidence to such an extent that she actually consented to accord him a rendezvous without the convent walls. Madame kept the appointment,—so did Desgrais,—and so, likewise, did a number of his agents. But little time was wasted in love-making. The Marquise was seized and immediately placed in a closed carriage. Desgrais returned to the convent, and obtaining access to her room took possession of all private papers.

Rarely, indeed, can a criminal be found who is able to refrain from disclosing his crime, either in whole or in part. Once committed, there seems to be an uncontrollable impulse to talk. It would be an exceedingly interesting task to endeavor to compute the percentage of cases where the offender was brought to justice solely because of his own statements. Sainte Croix wrote a confession of his crimes—the Marquise did the same. This interesting document, found among her papers, began with the words, "I confess myself to God and to you, my father." It told of the poisoning of her father and brothers, of an attempt upon the life of her sister, and of numerous other crimes.

Upon her arrival at Paris she was immediately placed in the Conciergerie, and her trial began. Of the numerous witnesses produced by the prosecution, one only need be considered. The talkative tendency just referred to is well illustrated thereby. The woman Huet testified that one day having

dined with the prisoner, the latter after dinner showed her a small box, filled with a powder, saying laughingly, "There is the means of taking vengeance on one's enemies." Perceiving that she had gone too far, the Marquise exclaimed, "What have I told you? Do not say anything about it to any one!"

to those made in the confessional. The paper (this according to the testimony of the Marquise) was written while suffering from delirium, the result of a fever. The directions of Sainte Croix relative to the box found in his rooms, offered no ground of suspicion against her. They were written



THE TORTURE OF THE BOOT AS APPLIED AT THE PRISON OF THE GREAT  
CHÂTELET, IN PARIS, IN 1777.

*The Original Print is in the Collection Hennin.*

Although an American or English lawyer of to-day would shudder at the huge mass of hearsay evidence introduced, the trial seems to have been impartially conducted, and the Marquise fairly convicted.

Maitre Nivelles, her counsel, one of the leaders of the Paris bar, presented a strong brief in favor of his client. The admissions of guilt, he urged, should never have been received in evidence. They were analogous

before the Chevalier entered the Bastille, and consequently before he placed the poisons in the box. Penautier was clearly the party to whom, by the subsequent postscript, the poisons were to be delivered. The first portion of the Chevalier's will related only to the letters which Madame de Brinvilliers had sent him. Her flight was the result of an attempt to avoid certain creditors, who were unduly pressing their claims.



Such, in brief, was the argument for the defense.

On the sixteenth of July, 1676, the Court of Parliament rendered its decision, finding guilty "la dame Marie Marguerite d'Aubray, wife of the Sieur Marquis de Brinvilliers." She was condemned :

"To make *amende honorable* before the

having been done, she will be conducted and taken in the said tumbril to the Place de Grève, to there have her head cut off upon a scaffold, which for that purpose will be raised in the said place. Her body will be burnt, and her ashes scattered to the winds. She will first be put to the torture ordinary and extraordinary for the purpose of extort-



DEMONS APPLYING THE TORTURE OF THE WHEEL.

principal gate of the Church of Paris, whither she would be led in a tumbril, feet bare, a halter around her neck, holding in her hands a lighted torch of the weight of two pounds, and there, while on her knees, to declare that wickedly and in revenge and to obtain their property, she had caused her father and her two brothers to be poisoned, as well as attempted the life of her sister, now dead, of which she repents and asks pardon of God, the King and of Justice. This

ing from her the names of her accomplices. She is declared attainted and incapable of succeeding to the property of the said father, brothers and sister from the day of the said crimes by her committed. All her goods are confiscated. From them, as well as from property not subject to confiscation, there will first be taken the sum of four thousand livres fine for the King, five hundred livres for masses for the repose of the souls of the said departed, her father,

brothers, and sister, in the Chapel of the Conciergerie at the Palais, ten thousand livres damages for the said Mangot<sup>1</sup> and all the costs, even those assessed against the said Amelin called La Chaussée."

It certainly cannot be said that the ancient tribunals of France did not render sweeping decisions. We have now passed beyond the

with profound attention, exhibiting not the slightest sign of weakness. When the officer had finished, — "Monsieur, will you have the goodness to read it again? My attention was so attracted by the portion relating to the tumbrel that I fear the rest escaped me."

The executioner then prepared her for the torture, which, it will be remembered, was



THE WATER TORTURE.

stage when it was possible to witness a single court administering civil and criminal law at one and the same time, and in one and the same case. In so far as the charge of attempting to murder her sister is concerned, the conviction of Madame de Brinvilliers seems to have been based largely upon her own confession.

To the reading of this decree in her prison at the Conciergerie, the Marquise listened

<sup>1</sup> Widow of the Civil Lieutenant.

both the "ordinary" and "extraordinary." The form employed was that of "water." For the ordinary, the victim, after having been disrobed, was stretched across a small trestle of the height of about two and a half feet. Legs and arms were fastened to the floor or wall, with ropes drawn tight, so that the entire body described a half circle, almost as though it were stretched on the rim of a wheel. Water was then poured down the throat through a funnel. Five quarts

was the amount usually administered for the question "ordinary," ten for the "extraordinary." During the latter, a trestle of three and a half feet was substituted.

This torture the Marquise endured with the utmost resolution. Upon observing three barrels containing the water, "Surely, that is for the purpose of drowning me," she said, "for nobody expects that a person of my size is going to drink all that."

The officers in charge of the proceeding vainly endeavored to obtain from her the names of her accomplices, as well as the antidotes to the poisons employed. To the first she answered that there were none. To the second, that she had heard Sainte Croix say that, if a glass of milk were taken immediately after the administering of the poison, no ill effects would be experienced. Beyond that, she knew nothing. In all probability, these answers were true. The crime was not one which necessitated the employment of many individuals in its commission, and it is scarcely probable that the Chevalier entrusted to his mistress many of the secrets of his mysterious profession.

Desgrais, on horseback, followed the procession to the scaffold. Observing him, she requested that the executioner take up a position between them, "so that I shall not be compelled to look at that scoundrel who captured me." "On the scaffold," writes

Madame de Sevigné, "she was kept waiting for a quarter of an hour, while the executioner made the final preparations, a needless piece of cruelty, over which there arose a great murmur. The next day there were those that sought her bones as precious relics, for the people said that she was a saint."

The death of the criminals by no means ended the matter. Ugly rumors were afloat that would not down. Too many expectant heirs by far, too many young wives, had recently seen their secret hopes realized. The *Chambre Ardente*<sup>1</sup> appears to have been a cross between Inquisition and Star Chamber. To this tribunal extraordinary did Louis XIV. entrust the mission of laying bare these secret crimes of the French *noblesse*. Sainte Croix was no ordinary dealer in poisons, and his clients were numbered among the aristocracy. Disclosures followed thick and fast. After such persons as the Princess Louise of Savoy, the Duchesse de Bouillon, niece of Mazarin, the Comtesse de Soissons, mother of Prince Eugène, and the Maréchal de Luxembourg, had been examined, the matter was deemed to have gone quite far enough. Too many of the high-born of France were becoming involved, and the investigation was accordingly discontinued.

<sup>1</sup> Fiery Chamber.

## HUMORS OF THE ENGLISH JURY BOX.

BY LAWRENCE IRWELL.

IN "Twelfth Night," Sir Toby says: "There have been Grand Jurymen before Noah was a sailor," and although we do not know upon what authority he made this remarkable assertion, I have no hesitation in guaranteeing that in the event of a jury having

been empanelled on the Ark, upon the list being read over, one or more of the gentlemen summoned asked to be excused. The habit has so become an essential part of every desirable juror's make-up as to suggest that it must have been handed down from time immemorial.

To every rule there is an exception ; and I suppose there are satisfactory jurors, who joyfully look forward to the happy day when they will be called upon to do their duty to the State, and to justify the assertion put forward by the authors of the Magna Charta who insisted so positively that juries were the bulwark of the people's liberty.

Such a person was a certain Louis Ellis, who answered "Here" when the roll was called at a City of London Court a couple of years ago. Twice was the roll of fourteen names read out, and twice did the fourteen items of the bulwark answer to their names, though not all so pleasantly as did Louis Ellis. Once again was the list recited, while the fourteen wondered, as indeed did the reader, and well he might, for thirteen men answered to fourteen surnames, and "contempt" seemed rampant.

Eventually it was discovered that Louis Ellis was a woman, and a justly enraged woman, too, when told that her name was not "Louis Ellis," and that her services were not required. Said the fair jury-woman to the officer : "You said, 'Does Louis Ellis live here?' and I answered 'Yes,' and you handed me the paper." And when the officer, having got all the worst of the encounter, repeated that she need not stay, she retorted : "Oh, don't think I want to serve. I've been blessing this job of having to come here and waste my time, instead of cooking my husband's dinner!" And yet from the character of the protestations one is disposed to think that the lady was a little disappointed at not being allowed to serve.

In the City of London Court, a court for the trial of unimportant cases involving small sums of money,—the pleas for exemption have become so numerous that it is difficult to secure a jury, and laughter often fills the court when the various excuses are heard. Once, upon a name being called, a fellow

juror replied with the following "Irishism" : "He's living in the same house as I am. He's been dead about a year." "That's not true," added another voice, "he's in the lunatic asylum. Wouldn't he like to be here!" (Sometimes, alas, we fear that he is.)

An unusual plea for exemption from jury service was made some fifteen years ago at the Old Bailey, when a juror pathetically beseeched the presiding judge (the Common Sergeant) to excuse him because he weighed twenty-three stone (322 pounds), and could not possibly get through the door into the jury-box. In complying with the request the judge remarked : "It is a weighty reason." The same might have been said by the judge who allowed the juror to be exempt from service on the ground that he was very anxious to attend a funeral. The feelings of the judge when he learned after granting the request that the applicant was an undertaker, can be left to the imagination of the reader.

"Well, I don't intend to sign the verdict," said a juror at an inquest. And turning to the coroner, he added : "Can't you give me a day's shooting?" And then, apropos of the official salary : "If I was paid ten pounds a week, I'd 'ave some good 'unting' for my friends, I would." It is with pleasant interludes such as this that the dull round of a coroner's existence is enlivened in England. He must be either a physician or a lawyer (solicitor), and as a rule, outside the large cities, his professional work is small. In the higher courts the jurymen (this word in Great Britain is more common than "jurors") are usually required to reserve their energies for the verdict, although it is true that in the celebrated *baccarat* case a juror who insisted upon examining the then Prince of Wales extracted from the royal witness some valuable testimony.

The great desire of "the gentlemen of the jury" to pose as humorists is always apparent, and in addition, unconscious humor



is ever present in the verdicts of coroner's courts. The following are examples of what one would call "second nature": "We find that the child was strangled, but we are not satisfied whether it lived or not"; "We are unanimously of the opinion that death was due to natural causes, accelerated by the accident," — "death was due to heart failure arising from congestion of the lungs, acted upon by the bite," — the case had a dog in it. I believe it required twelve Warwickshire jurors to return the monumental verdict of "We find the accused not guilty, but we should like the court to reprimand him." Whether the sons of Warwick were influenced by the words "Sweet mercy is nobility's true badge," or whether they bore in mind the Cowperian line, "Mercy to him that shows it is the rule," and determined to do their duty, and at the same time provide for the future, who can say?

I have heard it related, how truly I cannot tell, that in an undefended case the foreman of the jury returned to the court-room with his colleagues and informed the judge that, although they were eleven to one, the prospects of their all coming to an absolute agreement was remote, as one man obstinately refused to agree with the other eleven. Perhaps he had in mind Pope's lines —

"The hungry judges soon the sentence sign,  
And wretches hang, that jury-men may dine,"

and did not wish their sense to be applied to the panel of which he was so prominent a member. The judge, annoyed that anyone could so obstinately refuse to deal out justice, addressing himself to the juror, went over the case, point by point, with elaborate care, finally demanding how he could refuse to find a verdict of guilty in so obvious a case. Then a voice piped forth: "That's exactly, my lord, what I've been trying to persuade the other eleven."

That the Erin Isle is keeping up its reputation is evident from a case tried in the Dublin Recorder's Court last year. The Recorder, after explaining the law, said: "Gentlemen of the jury, you will acquit the prisoners." (This term is used in Great Britain in place of "accused.") The issue-paper was then presented to the foreman of the jury who signed and returned it; whereupon the Recorder, as a matter of form, enquired: "Gentlemen, you find the prisoner not guilty?" "No sir," replied the foreman promptly, "we find him 'guilty.'" "Surely not," remarked the Recorder, "I said 'Gentleman, acquit the prisoners.'" "*I thought you said, 'convict,'*" calmly answered the leader of the twelve important men.

A sympathetic London jury, some years ago, found a prisoner guilty, but recommended him to mercy, saying that if the judge would suspend sentence they would send the malefactor, who was a foreigner, back to his native land: and what is more, they kept their word, even seeing the man safely aboard the steamer. Another London jury, whose eyes were filled with "the tear of sympathy, the milk of human kindness" to such an extent that they were absolutely blinded, emulated the generous treatment meted out by their brethren referred to above, by bringing in a verdict of not guilty, in a case of pocket-picking, and having done so, presented the accused with twelve shillings subscribed by themselves. It was an unpleasant moment for these jurors when the judge, after the verdict had been announced, blandly remarked: "I may now tell you, gentlemen, that this man has been convicted many times."

No wonder that the compilers of *Magna Charta* insisted on the fact that juries are the bulwarks of the people's liberty — of some people's.

## A LAWYER'S STUDIES IN BIBLICAL LAW.

## THE POWERS OF THE PATRIARCH.

BY DAVID WERNER AMRAM.

THE patriarch had a two-fold legal status, he controlled the internal affairs of the family and represented it before the outer world. As was indicated in the article on "The Patriarchal System," the heads of the houses in their capacity as representatives of the family met in their councils and gradually built up a system of public law, which largely helped to undermine their own ancient prerogatives. We are not at present concerned with the Jewish public law, our interest being confined to consideration of the status of the patriarch as the head of the family in the exercise of his powers over its members. Originally his power rested on might, and was uncontrolled and unrestricted. Its absoluteness is best illustrated by the fact that the patriarch exercised the right of life and death over his children. When Abraham attempted to sacrifice Isaac (Genesis xx, 2), and when Jephthah actually sacrificed his daughter (Judges xi, 30-40), neither the contemporaries of the actors in these family dramas, nor the chroniclers who record them, see anything illegal or immoral in their acts. When Reuben on leaving his two children as pledges with his father says to him (Genesis xlii, 37), "Slay my two sons if I bring him (Benjamin) not to thee," and when Judah, upon receiving a report of his daughter-in-law Tamar's supposed immorality, said (Genesis xxxviii, 24), "Bring her forth and let her be burnt," they were simply exercising the powers of the patriarchs in dealing with members of their family.

The recognition of the sacredness of human life has arisen among men not by reason of any innate moral sense which condemns

murder, but because of the active and persistent objections the people had to being killed. The legal and social convention, now generally recognized, that murder is wrong, grew out of the instinct of self-preservation which prompted men to spare life, when, by so doing, they improved the prospect of having their own lives spared. In the early patriarchal days "Thou shalt not kill" really meant "thou shalt not kill the member of another family," because the legal consequences of murder were visited on the murderer only when the victim of his crime was a person who was not under his *potestas*. Eventually public policy which restricted the right to kill as between members of different families, checked the power of the patriarch over members of his own family. Other factors contributed to this result. Although we find that Isaac was entirely willing to be made a sacrifice at his father's request, it can be readily understood that grown and bearded men, with families of their own, would not tamely submit to the uncontrolled exercise of such vital power by their father over them, and in the Mosaic age the law had progressed so far that the life of the child had become as sacred as that of the father. The last stage of the exercise of this power was the offering of the child as a sacrifice to the Deity. This remnant of the old unrestricted power was preserved by ecclesiastical sanction. As long as the priesthood considered human sacrifices acceptable to the Deity, a justification still remained for the exercise of this ancient patriarchal right, but after the Levitical code had pronounced the law (Leviticus xviii, 21) "Thou shalt not let any of thy



seed pass through the fire to Moloch," and attached the penalty of death to breach of this law (Leviticus xxii, 2), and when the Deuteronomic code extended this prohibition to other gods beside Moloch (Deuteronomy xii, 31), this practice was doomed, and although it was followed for many years thereafter, it no longer had the sanction of the law. Later instances of the exercise of this right were the sacrifice of the sons of the King Ahas (2 Kings xvi, 3) and of King Menasseh (2 Kings xxi, 6) and the general prevalence of this practice among the people in the time of the corrupt and idolatrous King Hoshea (2 Kings xvii, 17), but the chronicler in reporting all of these cases strongly condemned them. After idolatry had been entirely rooted out of Israel, this practice entirely disappeared.

Having observed that the supreme power of life and death was the constitutional right of the patriarch, we are prepared to find in the Biblical records evidences of the exercise of lesser powers over his wives and children. In the legend of the Garden of Eden, ancient tradition emphasizes the subjection of woman "Thy desire shall be unto thy husband, and he shall rule over thee" (Genesis iii, 16). Originally she had no rights that the husband was bound to respect; she became his wife either by being stolen or purchased; and she could be dismissed by him or sold at his pleasure (Exodus xxi, 8; Deuteronomy xxiv, 1).

Public law gradually modified the patriarchal power, and the evolution of her status from a mere chattel to a perfect legal person will be the subject of the next article.

The children of the patriarch were likewise salable property. It was common for the father to sell his daughter as a wife or as a bondwoman, and even as late as the days of Nehemiah, sons and daughters were sold as servants because of the destitution of their

fathers (Nehemiah v, 5). In those cases in which the daughters, though married, remained in the house of their father, they were still under his control rather than under that of their husband; thus we find Laban saying to Jacob, his son-in-law, referring to the wives and the children and the cattle of Jacob (Genesis xxxi, 43), "These daughters are my daughters, and these children are my children;" "these cattle are my cattle; and all that thou seest is mine." Indeed, Jacob left Laban's house clandestinely because he feared that his wives would be taken from him (Genesis xxxi, 31).

A similar exercise of power is found in the case of Samson, whose father-in-law gave Samson's wife to another, and upon Samson's return, met his indignation by saying with great simplicity (Judges xv, 2), "I verily thought that thou hadst utterly hated her, therefore I gave her to thy companion; is not her younger sister fairer than she? Take her, I pray thee, instead of her." The same thing is recorded of King Saul, who, after marrying his daughter Michal to David, took her from him and gave her to Paltiel (1 Samuel xxv, 44). In these cases it is not unlikely that we have survivals of a matriarchal state of society in which kinship was reckoned through the females.

The patriarch not only gave his daughter in marriage, but he also found wives for his sons (Exodus xxi, 9; Genesis xxiv, 3-4). All of these powers were gradually modified, and eventually destroyed under the influence of more enlightened public opinion as expressed in the Mosaic codes. The disintegration of the patriarchal power reached its climax in the Mosaic codes. In Esau's marriage with Judith the Hittite woman against his parent's wish, we have an indication of the weakening of the patriarchal power. We see a son rebelling against the patriarchal authority (Genesis xxvi, 35). The family of

Jacob was in a condition partly of dependence and partly of independence. Reuben, although still a member of Jacob's family, had his own family over whom he exercised the patriarchal power, even, as we have seen, offering his sons to be killed upon his default in bringing back Benjamin to his father. The sons of Jacob rebelled against their father's wishes, and killed the men of Shechem on account of the insult to their family by the violation of Dinah (Genesis xxx, 4).

The last act of authority of the patriarch was the apportionment of the inheritance among his children, and the appointment of his successor as the head of the family. In both these cases his will was law until, in the one case the Mosaic legislation, and in the other the progress of time, put an end to his arbitrary power and substituted public law.

The rights of the members of the family against the patriarch were acquired only after a long struggle under the spur of the instinct of self-preservation, aided and strengthened by the influences of religion and more enlightened notions of public policy and human rights. It was not because those subject to the patriarchal authority had any natural right to life or to liberty, but simply because they were enabled, in the course of time, to compel their master to make unwilling concessions to them. The Mosaic law takes a high position in these matters, and its principles which find their culmination in such perfect moral maxims as "Thou shalt love the stranger," and "Thou shalt love thy neighbor as thyself," destroyed the old system by the gradual insinuation of its higher ideals among the people, through prophets, and elders, and priests. The Mosaic laws represent the struggle that took place between

the conservatism of inherited ideas and the elements of the new times. They record the victory of a higher morality. The laws recorded among the Biblical traditions and in the Mosaic codes followed a process of evolutionary development. The Bible can never be understood if the Biblical laws are presumed to be a complete system given to the people at one and the same time, without antecedent history or subsequent development. The Bible itself contains ample evidence of the fact that it is the result of centuries of growth, and that these laws are so many links in a chain of legal and social development which began in the darkness of the prehistoric times, and has continued uninterruptedly, broadening with the life of the people and growing more refined and more complex.

Nor is it easy to determine the chronological succession of the Biblical laws. The mere fact that a law appears in Genesis by no means proves that it is anterior in time to one in Deuteronomy. The literary divisions of the books of the Bible are of practically no value in determining the chronological sequence of their contents. The old chronologies, like all Sunday-school methods of reading the Bible, must give way to rational, historical and critical study. The letter is no longer sacred, and the Biblical records, therefore, must be subjected to the canons of criticism that govern the study of all ancient literature. The rabbis of the Talmud recognized and admitted the fact that matters which were chronologically anterior to others were so recorded in the Bible that they seemingly were of a later date, and they formulated the maxim that the present place of any particular matter in the Biblical books is not conclusive evidence of its date.

## FLEET MARRIAGES.

BY VINCENT VAN MARTER BEEDE.

"IN walking along the street, in my youth, on the side next to the prison," wrote Thomas Pennant, in his "History of London," 1790, "I have often been tempted by the question, 'Sir, will you be pleased to walk in and be married?' Along this most lawless space was hung up the frequent sign of a male and a female head conjoined, with 'Marriages performed within' written beneath. A dirty fellow invited you in. The parson was seen walking before his shop: a squalid profligate figure, clad in a tattered plaid nightgown, with a fiery face, and ready to couple you for a dram of gin or roll of tobacco. Our great chancellor, Lord Hardwicke, put these demons to flight, and saved thousands from the misery and disgrace which would be entailed by these extemporary thoughtless unions."

So the illustrious "Highway of Letters" had come to this! Strange indeed that ". . . here where the Fleet once tripped

In its ditch to the drumlie Thames;" where the old Tabard Inn sheltered the Canterbury Pilgrims; where Wynkyn de Worde printed strictly hand-made editions; where Ben Jonson breathed out classical allusions; where Hogarth sketched scenes from Bridewell; where "Punch" was established; where Douglas Jerrold laid the scene of his comedy, "Doves in a Cage," and where is the working-world of John Davidson's journalists who speak in "Eclogues;"—strange that here, of all places, clandestine marriages should have been contracted for over seventy years at the rate of at least nine thousand a year!

Let it not be supposed that Fleet marriages were illegal. Far from it. That they were in the worst possible taste cannot be

denied. Although a marriage, to be fully approved by the sober-minded, must have taken place in the presence of a priest and two witnesses, yet even the common law uniting of man and wife, with only witnesses present, could not be annulled by the Ecclesiastical Court, and was legalized in the twelfth year of Charles II's reign. So far as can be gathered, Fleet marriages were "inaugurated"—as American newspapers would say—by one George Lester, a debtor in Fleet Prison, married by the chaplain of that institution to "a woman of fortune, Mistress Babbington." Little did Master Lester realize what a vast succession of marriages he was "husbanding!" Clandestine wedlock was cheap and convenient. Festivals, settlements, presents, "drum and fiddle," and fees of priest and clerk brought the outlay well up in the pounds sterling, and bann publishing was a tedious business. Then, too, there were important personal considerations.

The "rules" or boundaries of the Fleet contained many worse than "fox-hunting" parsons. In the reign of Queen Anne there was among the clergy a "conspicuous minority" of "unworthy vessels." Hogarth has pictured some of them in a familiar punch-bowl scene. With insatiable thirst and small purses the Fleet parsons jealously noted the increasing marital duties of the prison chaplain, and resolved to take away as much of his business as possible. Hence the scramble for would-be-weds which ended in a grand climax only with the Hardwicke Act.

Farringdon Street, along which "the river of wells,"

"With disemboguing streams

[Rolled] its large tribute of dead dogs to Thames,"

Marylebone Lane, Brook Street, were infested with "plyers"—so called—comparable to those music hall "rooters" on Coney Island, who vociferously insist on immediate patronage. The Fleet plyers did not hesitate to "press" the right sort of victim into a hasty marriage. The parson performed his rite in a barber's shop, a coffee-house or a chapel, according to the size of the fee. This sum was usually shared by the landlord of the marriage-house,—who was often the manager of a prosperous marriage syndicate,—by the parson, by the pleyer, and by the witnesses, who were often pot-boys and barmaids. The marriage was registered in a large book and also in the parson's private memorandum—his daybook, as it were. When it was advisable for an entry to be ante-dated there was an extra charge, as there was for a handsomely engraved certificate. The ordinary fee was five shillings, but beaux and flush sailors were not miserly with their guineas. It was not always a genuine parson who put on bands and robe; but here is the half-repentant entry of a famous Fleet parson, dated 1736:

"Give to every man his due, and learn ye way of Truth. This advice cannot be taken by those that are concerned in ye Fleet Marriages; not so much as ye Priest can do ye thing yt is just and right there, unless he designes to starve. For by lying, bullying and swearing, to extort money from the silly and unwary people, you advance your business and gets ye pelf, which always wastes like snow in sun shiney day.

"The fear of the Lord is the beginning of wisdom. The marrying in the Fleet is the beginning of eternal woe.

"If a clerk or pleyer tells a lie, you must vouch it to be as true as ye Gospel; and if disputed, you must affirm with an oath to ye truth of a downright damnable falsehood—*Virtus laudatur alget.*"

The writer, the Reverend Walter Wyatt, got "ye pelf" to the amount of £700 a year, equal to \$12,500 nowadays.

Fifty or sixty couples a week was a fair average for a Fleet parson, but many of the notable clerics read the service to one hundred and fifty couples in the same time. There is a record of at least one parson who found it advisable to hire a curate to sub-marry for him. Sundays, Tuesdays and Saturdays were crowded days on the Fleet—and by days is meant any hour that the clock might strike. "The Clark Basset" controlled a number of parsons and chapel-rooms, made £200 a year, and bribed the collector for the Queen's taxes. John Mottram, parson, kept nine registers at different houses. One of the registers contained twenty-two hundred entries. A lusty coal-heaver did a smashing business as pleyer in front of the Lord Mayor's chapel.

These rhymes appeared in 1731:

"THE MORNING WALK."

"Where lead my wand'ring footsteps now?

The Fleet

Presents her tatter'd sons in luxury's cause:  
Her venerable Crape and scarlet Cheeks,  
With nose of purple hue, high eminent,  
And squinting, leering looks, now strike the eye.

B—sh—p of Hell, once in the precincts  
called,

Renown'd for making thoughtless Contracts,  
here

He reign'd in bloated, reeling majesty,  
And pass'd in Sottishness and Smoke his time.

\* \* \* \* \*

Here Cleric grave from Oxford ready stands  
Obsequious to conclude the Gordian knot,  
Entwin'd beyond all dissolution sure;  
A Reg'lar this from Cambridge; both alike

In artful Strategem to tye the noose,  
While women 'Do you want the Parson?'  
cry."

"Yesterday," said *The Old Whig* of April 14, 1737, "Parson Gaynham, near eighty years of age, very remarkable for having coupled thirty-six thousand persons in the Liberty of the Fleet, was himself married in the same Liberty to his servant-maid, who has lived with him upwards of fourteen years."

*Reed's Weekly Journal*, June 25, 1737, contained this item:

"Monday last the wry-neck'd Parson of the Fleet (who by his own Books, as it appeared at Christmas last, had married thirty-six thousand persons), was attacked at his Majesty's suit and carried to Wood Street Compter for £200, being the penalty for giving certificates of Marriages that are not stamp'd with a 5s. stamp, according to Act of Parliament."

"The Hand and Pen" barber's shop was a favorite chapel of Gaynham's. The following lines, written in his day, tell of him and other Fleet prelates of lesser degree:

"Long has old Gaynham with applause  
Obeyed his Master's cursed Laws,  
Readily practis'd every Vice,  
And equal'd e'en the Devil for device.  
His faithful Services such favor gain'd,  
That he first Bishop was of Hell ordain'd,  
Dan Wigmore rose next in degree,  
And he obtained the Deanery.  
Ned Ashwell then came into grace,  
And he supplied th' Archdeacon's place.  
But as the Devil, when his ends  
Are served, he leaves his truest friends,  
So fared it with this wretched three,  
Who lost their Lives and Dignity."

Brought to trial, the sulphurous bishop was asked why he could not recollect the names of certain persons whom he had united.

"Why, I have married two thousand couples since then," was his indignant reply.

There was not always honor among marriage agents of the Fleet. On witness of a plyer, a parson was convicted of forty-three perjured oaths, and fined one shilling per oath; but the plyer, much to his disappointment, received nothing for his pains.

The Reverend John Flood, who saved money by having his mistress "ply" for him, and died in the middle of a wedding, wrote in his memorandum:

"I have liv'd so long I am weary of living,  
I wish I was dead and my sins forgiven:  
Then I am sure to go to heaven,  
Although I liv'd at sixes and sevens."

The following entries from Fleet registers and memoranda tell their own story:

"Sepr 29 1736, John Bennett Turner of St. Clement Danes and Barbara Munden Batchr and Spr.

"He a little old man about 60 years of age and very effeminate in his voice. Domi Silk Clark."

"N. B. they had lived together 4 years as man and wife; they were so vile as to ask for a certifycate to be antidedated."

"N. B. the person belonging to ye house aloud me only 2s. out of 8s."

"Had a noise for foure hours about the money."

"N. B. Stole a silver spoon."

"Stole my cloathes brush."

"Her eyes very black, and he beat about ye face very much."

One marriage "was to be secret for a month."

"Oct. 3d 1742. James Higham Marriner of St. Margts West. Br Alice Sergeant do Sp. were married at Lilly's. Pd 17: 6. Marriage, 4s. A; Clk 5; C. 3 Boles of Bunch." [Bowls of punch.]

"Feb. 2. 1745. James Fraizer of Coll,

Sole's Rigt. of Foot Br. & Elisabeth Fisher of Stains Sp. Dare O. all. Pd M. m. Left a Silver Buckle for ye Bousom of a Shirt and a Hankerchife for 1s.: 3."

"September 14. 1737. A coachman came and & was half married and wou'd give but 3s. 6d. & went off."

"June 21st 1740. John Jones of Eaton Sutton in Bedfordshire and Mary Steward of the same came to Woods in Fleet Lane about six o'clock in the morning. Mr. Ashwell and self had been down the market Wood called him and I went with him there found the said man and woman wooman offer'd Mr. Ashwell 3 shillings to marry him he would not so he swore very much and would have knocked him down but for me. was not married; took this memorandum that they might not Pretend afterwards they was married and not Register'd."

"July (1744) 15. Came a man and wooman to the Green Canister, he was an Irishman and Taylor to bee married. Gave Mr. Ashwell [whose clerk was the writer of this entry and the one before it] 2: 6. but would have 5s went away and abused Mr. Ashwell very much, told him he was a Thief and I was worse. Took this account because should not say they was married and not Registered. N. B. The Fellow said Mr. Warren was his relation."

"May 28th 1742. Thomas Tinworth of Lowton in Essex B & Sart: & Jane Palmer ditto Sp. Half married went away (he had 4s) to fetch more money. Saide he had a hundred Pound left by his father, his uncle had it in his hands took this account because She could not come and say they was married and not (registered)."

"John and Elizabeth August 30th 1737, at Mr. Sandy's the Fleet. He said he belonged to the sea, and had his own hair."

"December 12th 1739. About ye Hour of 10 in ye Evening there came 2 men and One woman to Mr. Burnfords The man yt

was married appear'd by Dress as a Gentleman of fortune and ye woman yt was married appear'd like a Lady of Quality, ye Man yt came with em seemed to me to be a Tayler who sd he knew Mr. B——d very well & me likewise, The Gentleman would not pay but in a mean and scandalous manner, he offered d. & went Down stairs and Down ye Court came back Again & pd. g. in all and went away without telling of tier, their names. N. B. He sd he had 2 Xn. Names viz: John Skinner & ye Gentlewoman sd her name was Elizabeth. N. B. The Gentlewoman when married had on a floured Silk Round Gown & after she was married she pulls off her flower'd Gown & underneath She had a Large full Black Silk Gown on & went away in ye same. Ye other was wrapt up. B——d absent."

"1741. May ye 12th 1741. A certain man with a spott in one eye a Sinament coat And a young woman with a Pritty Genteel face & Appearance came to Mrs. Crooks and were Married she had on a Linnen Gown the Man sd his name was Edward But would not tell who he was only yt he came from Spitalfield. The young woman sd her Name was Ann More of ye same Parish."

"8 Oct: 1741. Robt —— Mary at Newmarket married. Pool'd of his coat because it was Black, said he would not be married in that coat fo yt Reason pd 2s, 6."

One recorder was clever enough to make his private notes in the big register under the disguise of Greek characters in English combinations. A specimen of these freakish entries will indicate what proof they were against ignorant curiosity:

"January 1728. 13th. Andrew Wild a Whitesmith of St. Sepulchres and Mary Harold of do. Wr. and Ww per Jno Floud.

μαρρ: τληρηη σιλλινγς & ονη δο. χηρτίζη. Τλη βριδηγροομ was τλη βροτληρ of τλη μημοραβλη Jonathhan Wild Εχρηχτηδ at Τγβυρν.

Fleet Street was fond of advertising. Joshua Lilly, who kept one of the Hand and Pen houses announced :

"I Lilley at ye Hand and Pen, next door to the china shop, Fleet Bridge, London, will be perform'd the solemnization of marriages by a gentleman regularly bred att one of our Universities, and lawfully ordain'd according to the institutions of the Church of England, and is ready to wait on any person in town or country."

A watchmaker, who sometimes personated a cleric "in a flower'd morning gown" at the Bull and Garter, Great Hand and Pen and Star, informed the public of "The old and true Registrar near the Rainbow Coffee House."

This odd notice is not easily forgotten :

"John Lando, a French minister, in Church Street, Soho, opposite att a French pastry or nasty Cook's. His Landlord's name is Jinkstone, a dirty chandler's shop : he is to be heard of on the first flower next the skye."

M. Lando varied parsoning with tutoring in Latin and French three times a week.

Far and away the greatest marriage vender known to the Fleet was the Rev. Dr. Alexander Keith, whose advertisement ran :

"The way to Mr. Keith's Chapel is thro' Piccadilly, by the end of St. James's Street and down Clarges Street, and turn on the Left Hand the Marriages (together with a Licence on a Five Shilling Stamp, and Certificate) are carried on as usual, any time till Four in the afternoon, by another regular Clergyman, at Mr. Keith's little chapel in Mayfair, near Hyde Park Corner, opposite the Great Chapel, and within ten Yards of it. There is a Porch at the Door like a Country Church Porch."

On the day before the passage of Lord Hardwicke's measure enacting "that any person solemnizing matrimony in any other than a church or public chapel without banns

or license should, on conviction, be adjudged guilty of felony, and be transported for felony ; also that all such marriages should be void," Fleet Street went into a wild, scrambling festival of Hymen, which resulted in no less than two hundred and seventeen marriages !

Dr. Keith, looking on the act as a personal insult, was prompted to write a thirty-two-page pamphlet, entitled "Observations on the Act for Clandestine Marriages." This protest sold like hot cakes. Among the doctor's remarks were these :

"Happy is the wooing that is not long a-doing, is an old proverb and a very true one, but we shall have no occasion for it after the 25th of March next, when we are commanded to read it backwards, and from that period (fatal indeed to old England) we must date the declensions of the numbers of the inhabitants of England.

. . . . Another inconveniency which will arise from this Act will be, that the expense of being married will be so great, that few of the lower class of people can afford, for I have often heard a Flete-parson say, that many have come to be married when they have had but half a crown in their pockets and sixpence to buy a pot of beer, and for which they have pawned some of their cloaths."

Horace Walpole, in writing of a Mayfair chapel marriage said :

"He sent for a Parson. The Doctor refused to perform the ceremony without license and ring. The duke swore he would send for the Archbishop ; at last they were married with a ring of the bed curtain, at half-an-hour past twelve at night, at May Fair Chapel."

When Keith was wanted for performing eleven hundred and ninety bannless marriages during the year (1755) after the passage of the Hardwicke Act, he exclaimed :

"—the Bishops: so they will hinder my marrying? Well, let 'em, but I'll be revenged. I'll buy two or three acres of ground, and by God, I'll under-bury them all!"

His conviction made void some fourteen hundred marriages. In the Fleet Prison he amused himself by sending out an appeal "To the Compassionate," stating that in his

prime he had given away the greater part of his income to the needy.

The last Fleet wedding came off in July, 1840, when a debtor, aged seventy-six, a prisoner for fifteen years, was married to a lady of sixty-two in St. Bride's Church. Farringdon street was crowded with spectators, but among them all was not a pleyer or a marriage-house keeper.

## DEVELOPMENT OF TRIAL BY JURY.

BY E. C. LAWRENCE.

**I**F we trace the history of legal development from the earliest custom of our remote ancestors to the latest statutory enactment of our refined society, we shall find no subject which has had more influence in shaping our legal conceptions of justice; no subject to which we may ever return with zealous study and which will afford us more benefit and general information than that English institution, the trial by jury.

Of its origin we can say that it was of great antiquity. We find a record of its use among the early Greeks and Romans. In Rome we see a number of justices, with a judge at the head as advisor, hearing and deciding of the innocence or guilt of a suspected person. But this Roman jury, as well as the still earlier Greek jury, if we may call it such, was in scarcely any respect, in form or duties, like the jury of our own time, and the earliest authentic record of the use of the jury, in the form which it was later to assume, is found in the early writings of the nations of northern Europe. It was there a royal institution, and was employed by the Frankish kings to determine local customs, the conduct of royal officers, and ascertain the existence of any crime which might be construed to threaten the King's peace. This was the Frankish inquest, which

we find in use as early as the ninth century. By it the rulers placed themselves outside and above the then existing custom of trial by ordeal and oath with oath-helpers. They were able to learn exact facts, and were not compelled to submit to those earlier and unsatisfactory tests.

It seems, however, to be a somewhat mooted question as to whether the English trial by jury is a direct descendant of the Frankish inquest or not. It was but natural that the early rulers, of whatever people, should have sought to obtain information from trusted men regarding their rights and duties; regarding the local customs in which they had an interest; regarding the occurrence of crime; and this we find to be the case. We find it in the Nustria which the Normans were invading in the tenth century. We find a record of it in the Scandinavian law books, and yet a knowledge of these things does not seem to disturb our confidence in its derivation from the Frankish inquest. It is said that the Anglo-Saxon dooms do not give us a clue to it, and it is also said that the jury were not evolved from the doomsmen of earlier times. A judgment of the doomsmen was a very different thing from the sworn verdict of the jury. "It may be possible," says an eminent historian, "to



transform doomsmen into jurors when both these institutions have become fully established, but that the jury should have been evolved from the doomsmen seems almost impossible." That it was taken to England by the Franks we may be confident; that it was original with them and that they did not acquire any portion of it from Scandinavia, we may be equally confident. True, the Scandinavian inquest seems to have developed independently; but as it was of later development than the Frankish inquest, it cannot be said to have influenced it. Some have contended that the entire jury system was indigenous in England, others have regarded it as the product of Anglo-Saxon genius, and still others that it was introduced into Europe from Asia during the Crusades, that it was of Slavonic origin, and from them was borrowed by the Saxons. Another ingenious theory is that it was developed in Gallic soil from Roman principles, but this, as well as the other theories we have just mentioned, show upon examination that their inventors have been misled by superficial evidence or that they argue from hypotheses only. The only theory which is able to stand any rigid test is that which ascribes its derivation to the royal custom of the Carolingian kings. Some of these other theories may have a few facts to support them, but as there is practically no direct evidence of its Slavonic origin, and as it existed before the Crusades, we dismiss them without further discussion. According to Savigny, Bacon and Blackstone, besides many other great authorities, it was introduced from primitive Germany. According to the same authorities it was employed there by the Franks to ascertain royal rights, local customs, and the existence of crime, as well as to decide questions of dispute between parties consenting to its use. The Carolingian kings issued instructions to their Missi much as did Henry II. to his itinerant Justices. We do not find this to have been practised by the Danes,

Scandinavians, or by the people of southern Europe, through whom it is supposed by some that the origin of the jury trial can be traced. We do however find it more or less practised continuously by the Franks, and later for the same or similar purposes by the English, and these facts alone would indicate that the practice had the same origin, and had descended from the time of the Carolingian rule to the time of Henry II.

Much of the obscurity we encounter in tracing trial by jury from the Frankish inquest is due to the many forgeries which were incident to the frequent quarrels and varying fortunes of Church and State, and also the unreliable character of all written documents of the time. Then too for a time during the Middle Ages, deep darkness settled down on the Germanic legal ideas, and the sworn inquest of neighbors on the continent, except perhaps in Normandy, was almost unknown because of the rise of the Roman and Canon law, and we may safely say that but for the conquest of England by the Normans it would have perished long ago and now be only a matter of legal curiosity.

Let us now see what was taking place in England before the Norman Conquest. In the early Saxon government of England we find what, by a later development, was to be the grand jury, exercising its functions. This royal inquest, for such we may call it, consisted of twelve or more men chosen from every hundred by the sheriff of the county, whose duty it was to investigate the condition of the hundred, inquire into the conduct of its members, and upon charge brought by the sheriff or by their own complaint, accuse and indict all who had been guilty of offence. But the accusation of suspected persons in criminal cases by one jury of twelve men or more of their fellow citizens, and the subsequent trial by a second jury of twelve different men is a course of procedure which seems to have been adopted in England alone, and to have arisen as did

many other great principles of her constitution out of events and conditions which were peculiar to herself and her development. The danger of submitting to the same persons the power of accusing and the power of subsequently trying the accused, was soon apprehended and emphasized the necessity of a second and independent jury upon whose decision should rest conviction or acquittal. This was the petit jury as distinguished from the grand jury of accusation.

We cannot say that there was only one possible origin for the jury. We cannot even say that England was utterly unprepared for the introduction of the Frankish inquest, for as early as the year 997 we read how a moot is to be held in every *wapentake*, and how the twelve eldest thanes are to go out with the reeve and swear upon a relic that they will accuse no innocent and conceal no guilty man. This certainly looks like a jury of accusation, and from it we should draw the conclusion that its origin was popular and not royal, if we did not know that the practice was the result of, and in keeping with, an ordinance of Ethelred. We may safely say that the Frankish inquest was introduced into England before the Conquest; and that the Norman duke brought it with him in a more developed form as one of his royal prerogatives, can scarcely be doubted. We find in Pollock & Maitland's "History of English Law" that England had scarcely been conquered when the sworn inquest of neighbors appeared as part of the system of government and royal justice. The great record known as "Domesday Book" was in part a compilation of the verdicts of juries. About this time we see the use of the trial by jury extending itself, slowly at first, however, for we scarcely hear of it in the "*Leges Henrici*," and throughout a large part of the Norman period, the trial by jury, the admittance of the inquest into any proceeding, is regarded as an exception. Under Henry II., however, the exception becomes the rule.

During his reign and the reign of the Plantagenet kings which followed, this instrument of royal justice, which had been found in England by the conquering Normans, and modified by them in applying their own principles to it, was developed into the then modern trial by jury. Henry II. expanded and formulated it to such an extent that he was naturally regarded as the founder of it in its English character. First he uses it as a royal prerogative, then extends it so that it becomes the privilege of all and the settled law of the land.

It may be well to pause and point out the development of the grand or presentment jury and the traverse or petit jury under Henry II., as well as the distinction which existed between them and the purposes for which they were employed. We may say that the jury in general was used for two purposes. First, to render decision in civil procedure as shown in the Grand Assize, Assizes of Novel Disseisin, Mort d' Ancestor, Presentment and other actions. Second, to determine guilt or innocence of the party accused.

In the first case it is an inquest, and in a proprietary action for land the tenant has the privilege to reject a trial by battle and submit to the decision of the inquest, which was conducted in the following manner. The sheriff of the county summoned four knights who, when they had been sworn, chose twelve lawful knights who knew the facts and circumstances and who should decide upon oath which party had the better title. If they were agreed all was well, but if not, dissenting jurors were dismissed and new knights were called to fill their places until there was an unanimity of opinion and a decision was reached. This was known as afforcing the assize. Many things concerning its practice are objectionable. We see, in the first place, that a majority of the jurors ruled, for it was the majority who in a divided decision, retained their places, and it was the minority who were dismissed and

their places filled by others until a decision was reached. Then, too, we are told by an eminent historian that the jurors did not proceed upon fact as revealed in court, but upon their own previously formed opinion. Yet, we may say, that even under these circumstances it was superior to the former method of recognition by oath-helpers. It was a privilege whereby provision was made for the lives of men and the integrity of the state, as well, and in such a manner that the contesting party in maintaining their right in the possession of their freehold might not be exposed to the issue of a trial by battle. The principle from which it starts is that if in the course of pleading the litigants come to an issue of fact they may agree to be bound by a jury, and if they so agree, they will be bound thereby. The adoption of such a proceeding, based as it is upon the consent of the parties, is destined to become a rule, for if any litigant refused to abide by it there would be a presumption that according to his own ideas his cause was unjust.

As to the second use of the jury trial—its use in criminal proceedings—we may say that here we find it in its true English character. We have mentioned the fact that Henry II. brought it to a state of more or less perfection. It now remains to give a brief account of its extended usage as brought about by him. We have seen that the germ of the grand jury existed in England before the Norman Conquest. We have seen it in the administration of the hundred before the Norman period. Now under Henry II. we see it assuming a definite character, a form which in some respects it would retain even to the present day.

Concerning the jury of accusation we may say that by an Assize of Clarendon in 1162, twelve men from every hundred and four men from every township were sworn to present all who were suspected of having committed crime, for trial. These jurors were both judges and witnesses, producing

and giving evidence as well as rendering judgment. Their judgment, however, amounted to no more than an indictment, the justice of which was to be proved by subjecting the defendant to a trial by ordeal, or its alternative, trial by a second jury of twelve different men.

This last jury was the petit jury. We have no proof as to the time it arose, and some doubt is even expressed of its being a different jury than the one bringing the accusation in the period of which we are speaking, but according to the historian Forsyth, the separation of the grand and petit juries was certainly complete at the time of Edward III.

In tracing the development of the jury in civil cases and its development in criminal cases we are surprised at their similarity. We are confident of their separation in early times, but in the eleventh and twelfth centuries, the two juries, the civil and the criminal, are tending to coalesce, and by the end of the twelfth century we are unable to distinguish them. By another assize of Clarendon, 1194, twelve knights from each hundred answered for their hundred before the justices in eyre in matters criminal, fiscal and civil. Thus we see that the jury in civil cases and the jury in criminal cases at that time are one and the same, and since they continue the same their development is a common development.

We now direct our attention to the time when the jury as witnesses and the jury as judges were separated. In the reign of Edward III. the jurors still retain their character as witnesses. They certify to the truth from their knowledge of the facts, no matter how they acquired it, but at the end of his reign we find a change taking place, and in the reign of Henry IV. this change becomes fixed. At this time it appears that the jury were allowed to base their verdict only upon the facts as shown in court, but their selection from the immediate vicinity in which the action was brought, and the fact that they sometimes returned a verdict with-

out witnesses, would indicate that their previous knowledge of the facts did not disqualify them from serving, but that this element was counted on and was deemed essential to the just consideration of the case. This feature of their requirements however was gradually thrown into the background, and it was insisted that a juror in order to serve should have no knowledge of the facts and circumstances except as they were revealed in open court. This is the form it had assumed at the time of Edward VI., and in this form it has come down to the present day. Yet we do not find until about the middle of the sixteenth century any trace of a process known to the law for summoning witnesses.

The development of the trial by jury has by this time been practically completed, and we turn to it as employed in England and America at the present time.

In England, as well as in most of the United States, we find the grand jury acting as the medium of accusation. They do not try the accused, but consider accusations for the purpose of determining if there is enough doubt or suspicion to warrant a trial by a second jury. This grand jury consists of not more than twenty-three, nor less than twelve men, who after they have been charged by the judge, give attention to each particular case, examining witnesses as in an *ex parte* proceeding, and if they think that sufficient evidence has been produced to warrant an indictment, they find a true bill against the defendant, and if not, they dismiss the action as unworthy of further consideration. There is a custom of long standing which provides that no man shall be condemned unless twelve men concur in an indictment against him, and because of this custom, which was later incorporated into the American laws, we see the maximum number of grand jurors fixed at twenty-three, for with such a number or less, a judgment of twelve against him would give a majority, and these two factors, the con-

currence of twelve and a majority, would constitute the authority for issuing the bill of indictment.

The subsequent part of the trial of criminals is performed by the petit jury. It is the practice in England that the prisoner should not, except in certain cases, such as treason, be acquainted previous to the trial with the character of the charge brought against him, nor is he allowed a knowledge of the witnesses who are to appear against him. He is arraigned before the court without any preparation of his case, and is asked to plead. He cannot demand counsel from the crown to defend him, but generally has very little trouble to secure such. In the United States, however, he is furnished with a thorough knowledge of the charge against him. But he is not supposed to have a previous knowledge of the witnesses who are to appear against him. He also has the privilege of a thorough preparation of his case, and will be furnished with a lawyer by the State if he is unable to procure one for himself. In England, as in the United States, he is allowed to challenge the jurors to some extent without giving reasons, but beyond this he must give valid reasons why they should not serve. Many of these things however, are of local importance, and it is necessary to examine the State laws in order to find out what the true conditions are. After the jurors have been selected and sworn, the examination of witnesses, the remarks of the lawyers, and the charge of the judge follows, but as this proceeding in England and the United States is practically the same and is well known to all, we pass over it to a few peculiarities which exist in giving the verdict. If the jury are unable to agree they are discharged and a new jury is summoned, before whom the process of trial is repeated. But in England neither the jury nor the judge can grant freedom to the prisoner as can be done in the United States. This is the privilege of the Crown alone, and in this he is advised by the Home Secretary who

has previously investigated the matter. Nor can a new trial be granted as in the United States even though some error, in procedure or otherwise, has been committed. Redress may be obtained by petitioning the Crown to grant pardon or commute the sentence, and this is also done upon the advice of the Home Secretary.

We have spoken of the construction of the jury in criminal cases in England, and the method of procedure in other cases in which it was employed in order to show the differences and parallelisms of the juries in the two countries—England and the United State. We may say that in civil cases the structure of the jury in the two countries is practically the same, and in the structure of the grand jury in criminal cases it is also nearly identical. We have mentioned a few of the divergences in the petit juries of the two countries, but these divergences are very few comparatively. In England we see the tendency of the sovereign to retain certain royal privileges, and in the United States we see these entirely within the control of the people. On the whole we may say there is only slight variation.

What are the practical defects which so materially affect the theoretical usefulness of trial by jury and so frequently render it an impediment in the administration of justice? In the first place the jurors are much below the standard of intelligence which may be justly expected of persons occupying such a responsible position. Then, too, some of the rules regarding their competency for service, such as that disqualifying those who have expressed an opinion previous to the trial, are absurd in this age of easy communication. It is almost impossible that an intelligent man should have failed to express himself forcibly regarding the guilt or innocence of an accused party in his vicinity, and consequently to serve as juror falls to the lot of uneducated persons who have not had energy enough to acquire a stock of general and current information, and who, in most cases,

are utterly incapable to pass upon a simple question of fact, to say nothing of the power vested in them to judge as well of the law applicable to any case.

Many faults of the system besides the incompetency of the jurors could be mentioned, but our space will only permit us to discuss one or two, and we will speak first of the requirement of a unanimous verdict. Perhaps one of the strongest arguments in favor of this requirement is its history. It is contended that its continued use for several centuries is sufficient ground for its being retained, but if we go back to the days of Ethelred, we find that this was not always insisted on. In some cases a decision of eight jurors was sufficient to render a verdict, and those who did not agree were subject to a fine. In fact we do not find a unanimous vote required on all occasions until the thirteenth century. From that time on, however, it is required, and many means, such as depriving the jurors of food and fire, were, until within a short time, employed in order to compel the jury to render a verdict. Without going further into historical detail, let us see what some of our great legal minds have to say of it. Judge Cooley characterizes it as "repugnant to all experience of human conduct, passions and understanding," and in another place says "It could hardly in any age have been introduced into practice by a deliberate Act of the Legislature." A former Governor of Illinois calls it, "the illogical unanimity system, which has become a great source of corruption and consequent denial of justice"; while a former Governor of Iowa has dubbed it "that antique absurdity which has too long fettered the administration of justice." We do not presume to say that these estimates are correct, but we take them as showing in some measure the attitude of progressive legislation. We have said that the chief argument in its favor is its history, but can we really admit this to be called an argument? Did the continued use of the stocks and pillory give us any proof of their

justification? Certainly not, nor can we admit that the continued requirement of a unanimous verdict can be insisted on for a like reason. Some states of our union have lately adopted the requirement of only a three-fourths majority in civil actions to render a verdict. This we find to be the case in California, Texas, and with some restrictions, in Connecticut. The general tendency, I think, is to dispense with the rule of unanimity in civil cases, and in accordance with the fundamental law, to retain it in criminal cases, and this in order to give the defendant, as criminal, every possible advantage of doubt. It is claimed that the requirement of a unanimous verdict secures a full and free deliberation of the case by the jurors, but our experience has taught us that in nearly every case the mind of the juror is made up before he leaves the box for deliberation, and if he has not made up his mind one way or the other, we consider him a weak-minded creature who will vote with the majority no matter how that may be, and whose judgment is therefore of little account. We have said that the requirement of a unanimous verdict secured to the defendant as criminal every chance of doubt. If any one of the twelve has a conscientious doubt of his guilt, it is to be construed in his favor. But let us look at it from another point of view. Suppose eleven of the jury are in favor of acquittal and only one holds out for conviction. Is it right that the man should again be put in jeopardy?

We do not wish to exaggerate the evils of the present system, but that it contains inconsistencies there can be no doubt. It would be extraordinary indeed to believe that every man of a jury of twelve men was free from every form of deception, and under the present system, the successful bribery of one is sufficient to render the verdict of no avail. That the rule of a unanimous verdict worked well two or three centuries ago will not be doubted, but under changed conditions and such as exist at present it must

be admitted that in too many cases it retards justice and shields criminals.

The whole argument in favor of the jury system and the rule of unanimity, aside from its history, is that it throws a more complete safeguard about the rights of the individual and relieves him from the personal injury which he might suffer from the hands of a single and unscrupulous judge. That it does this no one will doubt, and that under favorable circumstances it might do much more for the administration of impartial justice, is equally as true, but it too often happens that because of incompetence or prejudice or fraud a decision cannot be reached and impartial justice fails to be administered.

I have mentioned a few of the leading characteristics of the present jury system with a view of showing some of its inconsistencies and with a desire, equally as strong, to praise its redeeming qualities. An incident is related which happened in a criminal court and which admirably illustrates the value of a verdict of an incompetent jury. The charge was that of larceny, and after the counsel for the defendant had established the incapacity of his client to commit a crime, because of his idiocy, to the surprise of every one, the jury rendered a verdict of guilty. The judge laconically remarked that he supposed counsel for the defense would move for a new trial, and in reply the counsel said that it would hardly be desirable, for he believed that his unfortunate client had already received that greatest privilege and priceless heritage, a trial by a jury of his peers.

It is argued, and correctly, I think, that such cases of incompetency are inherent in any system depending on the wisdom and judgment of human beings, and yet such judgment must be made use of else we should be compelled to suffer the criminal to go unpunished and allow social order and regard for justice to fall into disrepute. The jury system as well as the judge are now on trial at the bar of public opinion.



There is an increasing tendency to disregard the ideas bequeathed to us by our ancestors, and there is a tendency practically as strong to resist any encroachment upon the settled maxims and customs of our fathers. This is the case with the development of the jury, and it is the stern opposition of these forces which has maintained

the jury in practically its early form and duties. The institution as a whole we may say has been of great service, and even the unanimity requirement has not been without its value; but it is time the system should be purified, its true nature known, and its form adapted to the benefit which it is calculated to produce.

### LONDON LEGAL LETTER.

APRIL, 1902.

THE war in South Africa has raised a great many questions, but none of more interest than those connected with the claim of citizens of friendly Foreign Powers against the English government for damage for wrongful arrest and deportation by the British military authorities. Most of these claims grew out of the wholesale arrest in Johannesburg of those who were suspected of being concerned in what is popularly known as the "Race Course Conspiracy" to murder Lord Roberts and other English officers after the British forces had occupied Johannesburg and Pretoria. There were a number of other demands, and among them those of employes of the Netherland Railway, but the greatest interest centred about those relating to the "Conspiracy." Several of the persons arrested for complicity in the affair claimed to be American citizens, mainly, however, of foreign birth. After their deportation and return to the United States, memorials were presented on their behalf to the Secretary of State who instructed the American Ambassador to seek redress from the English Foreign Office through the usual diplomatic channels. It was found however that the claims, including those of other powers, were so numerous that it would be inconvenient for the For-

eign Office to deal with them, and a Commission was therefore appointed for that purpose. This commission, which consisted of a King's counsel, two army generals, an ex-Indian judge, and an ex-Boer legislator, sat for sixty-five days, during which time no less than 1581 claims were examined. Of these only fourteen were preferred by Americans. The Commission heard some of the claimants in person, but in the great majority of cases they were presented by the various governments, either through counsel or some official connected with the respective embassies.

The procedure was very simple and was mainly characterized by an absence of all technicalities. The petitions, or memorials, were in some cases not even upon oath. They were, nevertheless, received, and having been read, they were answered, so far as possible, by the representative of the Foreign Office, who stated the particular grounds upon which the claimant had been arrested and deported. After this the further hearing of the case was adjourned to give the claimant an opportunity to procure evidence to rebut the charge against him. In each instance, there was upon the facts very little controversy. Most of the arrests had, as before stated, been made in connection with

the conspiracy in Johannesburg to murder Lord Roberts. The American claimants generally alleged that they were arrested on the night of the 13th or 14th of August, 1900, and after some days' detention in the military prison were sent to Cape Town, where they were placed on transports and taken to Holland, whence they were sent as steerage passengers in the regular Atlantic liners to New York. They claimed that after their arrest

against the military authorities. This was only a short time after the retreat of the Boers, and the occupation of the British forces, when there were about twenty thousand people in the town, most of whom were foreigners, and nine-tenths of whom were violently anti-English. They had come to the Transvaal during the war, and had been armed by the Boers, and had remained behind when the latter evacuated the place. With the large

UNITED STATES £428 11s. 5d.

GERMANY £150 15s.

RUSSIA £142 17s. 1d.

AUSTRIA-HUNGARY £133 18s. 6d.

BELGIUM £133 6s. 8d.

SWEDEN-NORWAY £125

ITALY £106 13s. 10d.

DENMARK £83 6s. 8d.

SPAIN £75

SWITZERLAND £50

HOLLAND £32 18s. 4d.

DIAGRAM SHOWING AVERAGE AMOUNTS, BY NATIONALITIES, PAID BY THE ENGLISH GOVERNMENT IN CASES OF WRONGFUL ARREST AND DEPORTATION BY BRITISH MILITARY AUTHORITIES IN SOUTH AFRICA.

no formal charge was made against them, that they had no opportunity of making any explanation as to their character or occupations, or of producing any evidence of their innocence; that they were not permitted to communicate with their friends, or to arrange for the protection of their property or the care of their families, and that in the manner of their deportation they were subjected to many unnecessary hardships.

The answer of the English Government was based upon the reports of the military authorities in the Transvaal, which unquestionably showed that there existed, at the time named, a plot in Johannesburg to rise

class of adventurers and the rabble inseparable from a mining community already in the town, they formed a most dangerous element, ripe for any rising. Their plan was to post themselves in a wood near the race track on the 14th of August, when it was supposed that all of the English officers connected with the troops in the town would be present unarmed, and shoot them down, and then, in the confusion which would result, overpower the troops themselves. Fortunately the details of the plot were communicated to the authorities by one of the conspirators, and it was prevented by a system of wholesale arrests. Nearly all of the



"undesirables" in the town, and many others who could not explain their presence in certain places were taken into custody. Scores were released after a short detention, and the following morning lists of all the arrested were forwarded to the various Consuls, with a request that they indicate such of the persons as they could vouch for. Those for whom the Consuls were thus willing to become sponsors were released, while the others were deported.

Under these circumstances it was difficult for the representatives of the claimants to urge redress on their behalf. None of the Powers was willing to contest the theory that every Sovereign has the right to deport, even in times of peace, aliens for any reason it may deem sufficient. The numerous decisions of the United States Supreme Court in the Chinese exclusion cases precluded the American representative from denying the right, and the European powers, for obvious reasons, were loath to do so. The fact that the Consuls had been appealed to and had not interfered was at least *prima facie* evidence that the deported were undesirable.

The only other question raised was as to the possible right on a field of battle, or among belligerents, of members of a regularly organized neutral Red Cross Ambulance. The question was raised by American and Dutch claimants, but unfortunately, from a legal aspect, the Commission was not called upon to decide the question, the members of the alleged neutral organization

having, in both instances, violated their neutrality.

Notwithstanding that the claimants had no standing in law of right, the Foreign Office, acting with the utmost consideration, proposed to settle the claims "out of court." This offer was willingly accepted in each instance, and the claims were withdrawn from the Commission. The only condition on the part of the English Government was that the sum which was finally agreed upon should be accepted in full settlement of all of the claims, and that the Government should not be required to see to the distribution among the respective claimants. The whole sum thus voluntarily paid over to all of the thirteen Powers who appeared for claimants was £108,950. The representative of the United States Government was exceedingly gratified at the exceptional consideration given to the American claimants; for whereas the average claimant received only £68 12s., the award to the Americans averaged no less than £429 11s. 8d. apiece. The same favorable discrimination is apparent if the comparison is made of the percentage of sums awarded to sums claimed. The American claimants were not modest in their estimate of their losses, and made demands largely in excess of those submitted by other nationalities. Nevertheless, they were awarded 38 1-4 per cent of the large sums claimed, to 13 1-4 per cent awarded to Holland, 12 per cent to Germany, and 14 per cent to Austria.



# The Green Bag.

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor,  
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

*The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.*

CONUNDRUMS, both in the asking and in the answering, have a certain fascination for the legal mind; which is, perchance, the reason why a scholarly writer, Frank Gaylord Cook, Esq., of the Boston bar, winds up an interesting article on Oliver Ellsworth, in the April *Atlantic Monthly*, in this fashion:

"Why is it, then, that Oliver Ellsworth has received so little attention from biographers and historians? He was not born in Massachusetts or in Virginia. In Connecticut, as in Pennsylvania, the historic field has been meagrely tilled. Moreover, the dramatic and opportune quality of his work has been perceived only through the perspective of multiplying years."

The first of these answers strikes us as ingenious rather than convincing. It seems to imply a literary boycott of such of our early statesmen and public men as could not show the union label denoting birth in Massachusetts or Virginia; or perhaps it implies nothing more than that these two Commonwealths have had the advantage, for a hundred years, of an enterprising publicity bureau. There are, however, certain difficulties in accepting either of these views. If either of them be true, how, for example, does it happen — to speak only of members of the Constitutional Convention — that George Ticknor Curtis, in his "History of the Constitution," when mentioning the fifteen most important and influential men in the Convention, names but six sons of Massachusetts and Virginia (or only five, if Franklin be not included), and nine sons, by birth or adoption, of the other States? Indeed, of the fifteen, three — the two Morrisses and Franklin — were members from Pennsylvania, and Roger Sherman came from Ellsworth's own State; so that

it appears that, by one eminent writer at least, the "meagrely tilled" fields to which Mr. Cook calls attention have not been neglected wholly. But in Mr. Curtis's classification Ellsworth himself is consigned to the "also ran" class of "men of note and influence in their respective States."

We can agree, indeed, with Mr. Cook in his proposition that "the perspective of multiplying years" was necessary for the perception of the quality of Ellsworth's work; but that the judgment of the present or of a later age will give Ellsworth a higher relative place than was assigned him by his contemporaries seems improbable. Rather he seems to have been one of those fortunate individuals who did good work in his time and generation, and reaped at least his full reward from the hands of the men of his own time. But his contemporary fame seems to lack staying-power.

Mr. Cook's suggestion, however, that Ellsworth "be called one of the fathers of American federation," is to be commended. For if he be so classed, certainly some fifteen or twenty other members of the Constitutional Convention of 1787 have a fair claim to recognition as sharers in the same paternity; and in this age of rapidly increasing "sons" and "daughters," to say nothing of socially-warring "dames," it is no more than decent caution to provide a liberal number of "fathers."

The fact is, however, that the ability shown by Ellsworth in the Constitutional Convention was that rather of the tactful politician than of the statesman. A recent writer<sup>1</sup> in *THE GREEN BAG*, in speaking of Ellsworth's work in the Convention, notes "how absolutely wrong the future Chief Justice was upon almost every question." "He had," says Mr. Jones, "two fixed ideas: the limitation of the national power,

<sup>1</sup> Francis R. Jones, Esq., of the Boston Bar. "Oliver Ellsworth"; *THE GREEN BAG*, Vol. XIII, No. 11; November, 1901.

and the preservation of democratic simplicity. He objected to the term 'National Government.' He wanted no central authority to interfere with the supreme sovereignty of the States. In spite of the fact that the Articles of Confederation had been found utterly inadequate, he urged that no new frame of government should be attempted, that only Amendments to them should be made. Consider the crisis. Think of the peculiar mental gestation that could produce such an attitude! He opposed at first the payment of representatives in Congress out of the National Treasury. Of course he advocated the equality of representation of each State in both branches of the Legislature. He supported the proposition to make the Justices of the Supreme Court an Executive Council with revisionary powers. He was hostile to giving the Executive authority to appoint judges. He wanted to leave the question of the qualifications for suffrage entirely to the States. He favored annual elections, saying that the people liked them and that they could do no harm. It is evident that not to him is due any of those provisions which have made the fundamental law of our country so workable that under it we have grown to a mighty and powerful nation."

Fortunately, less narrow views than Ellsworth's prevailed; and it is, indeed, to his credit that when it became apparent that the scheme of government must be fashioned on broader lines than he himself had advocated, he did yeoman service in the practical and difficult task of bringing about the adoption of a compromise plan.

Even if, as Mr. Cook laments, Ellsworth's "name is almost unknown to the present generation," we do not feel that any crying injustice has been done. It is inevitable that the names of only a handful of the leaders in any generation should live in the popular memory. That Ellsworth did good work as a public servant, especially in the Senate, cannot be gainsaid; that he was, as Mr. Cook says, "one of the ablest politicians or party leaders in our history," is true; but that his work, his ability, his character, do not entitle him to a niche in the Temple of Fame beside the few real leaders and true statesmen of his time seems equally clear.

*To the Editor of the Green Bag:*

Your February number gives much of Ambassador Choate's address, delivered in Edinburgh, on Abraham Lincoln, so admirable in its rhetoric and portraiture of character, yet some of us hardly agree with him that he was not "a learned and accomplished lawyer." Still, Mr. Choate says, "there were many highly educated and powerful men at the bar of Illinois," and that "it was by constant contact and conflict with these that Lincoln acquired professional strength and skill." To cope with such, why was he not a great lawyer?

What constitutes the great lawyer? Is it not to be great in any one of the great departments of law? Is it to be the fullest of black letter reading? Then Blackstone was a greater lawyer than Coke, that chief among lawyers. If there should be the largest scholastic acquirements, Bacon is preëminent, who is supposed by some to have been the author of the choicest literature of that period, and its most illustrious philosopher. But others surpassed him as lawyers. Hale and Mansfield, like Brougham, were scholars, which gave them graces at the bar, but the Scottish Erskine, and our Pinkney and Wirt, had not like advantages. Justice Story was a prodigious reader, with rich scholarship, an able judge, with the literary ability to adorn any law journal, but Chief Justice Marshall, with no such learning of the schools, was the giant of that United States Supreme Court bench.

The orator tells us of the mental development of that extraordinary man, that "his logic was invincible, and his clearness and force of statement impressed upon his hearers the convictions of his honest mind." Yet he did not, Mr. Choate thinks, have "any of the graces of the orator."

The accomplished ambassador speaks of Lincoln's "powers of persuasion" being "developed to an extraordinary degree"; and with such ability to array his facts before judges and juries, with his intimate acquaintance with the law that was applicable, could there have been a better equipment to meet his opponents? Can legal learning effect more? Mr. Choate is truly an able and a polished lawyer, and there appears to be seen in his favored family line the culture of generations to come to his aid, so that he is within Dr. Holmes's idea of education, which came to his mind; but how many a masterful

antagonist has he met, like O'Connor and Brady, who were not trained at his Harvard, and how many a college man has he come into contact with who had no such command of good and choice English as had that early "rough backwoodsman," Lincoln? They are fortunate who have those liberal advantages, but what should be their praise who become scholars without them? Is Lincoln not to be classed among them?

With his uncommon abilities, and his untiring application to develop them, if he was not a Chesterfield he was among leaders everywhere to be admired, and he had the applause of the people. Not only was he able to rank with those "highly-educated and powerful men at the bar of Illinois," but did he not rise to be a great constitutional lawyer? Did he not argue such questions with Douglas to be his peer, if not more, in those famous Illinois debates, and did not his superiority give him the presidential nomination? Who will forget his appearance in New York in that canvass, when he rose to meet the highest expectations?

Was he not *primus inter pares* in his Cabinet, as he sat by the side of those illustrious jurists and statesmen, Seward and Chase? He was every inch a President in his towering height in that perilous time when the Union was saved, and his messages to Congress are among the ablest to come from any Executive. Unlike Buchanan, scholar that he was, he was another Jackson to have place alongside of Washington. The young "rough backwoodsman" was the peer of the scholarly Everett in his rhetoric at Gettysburg. His phrase that ours is a "government of the people, by the people, for the people," is Websterian in utterance; and where did Webster ever give a better interpretation as a great lawyer and statesman of our political system? On one of the old university walls at Oxford there is a letter of Lincoln, written during the Rebellion to a sorrowing mother, in frame there for those students to study as a model of choicest English style. Is not that a university's tribute to his faultless diction? He had genius and industry, and what could have been added? As we think of him, there come to us the words of the Wise Man: "A man's gift maketh room for him, and bringeth him before great men."

J. HERVEY COOK.

FISHKILL-ON-HUDSON, N. Y., April 8, 1902.

# NOTES.

It was a dull day in the justice court, when a colored belle, radiant in finery, walked in and said blushinglly:

"Jedge, I want to git yo' to do me a favah."

"What is it?"

"I want yo' to mahhry me."

"I'm sorry, but I am already married."

"Huh! Yo' doan' s'pose I'd mahhry any lawyeh man, does yo'?"

"What would you marry?"

"Jes' nothin' less dan what I'se a-gwine to mahhry — a po'tah on a Pullman cah!"

Then she flounced out.

"A porter on a Pullman car," laughed the court. He thought it was a joke. Then he counted up his fees for the day, and concluded that it might not be a joke after all.

"I SEE that a Virginia judge has just given a man a year for stealing a straw hat from a store in the day-time," remarked the book-keeper.

"That's nothing," chimed in the draft clerk.

"I knew a man to get five years for little more than that. It was in Wisconsin. A sudden rainstorm came up one day and the man took an umbrella."

"I thought that was justifiable larceny."

"Ordinarily, yes; in this case, no. The umbrella was the court's."

A MAN was recently on trial in Michigan for the larceny of two sets of harness, a lap-robe and a buggy-whip. There seemed to be no doubt of his guilt. The court gave the jury the usual instruction in regard to their duty in ascertaining whether the value of the goods exceeded \$25.

The jury, instead of returning in a few minutes with a verdict, hung out six and one half hours and announced, when interrogated by the court officer at the court's order, that it could not agree. Finally the jury was brought in.

"Don't you seem to be able to agree?" asked his honor.

The young farmer who had been selected as foreman arose.

"We're agreed," he said, "that the harness is worth thirty dollars and the lap-robe ten, but we've split on whether the whip sells for fifty cents or a quarter."

THE county magistrate ordered the attending "officer" to admit one of the voluntary witnesses for the prosecution. The door of the witness-room opened, and a young man came out, and with a confident step walked towards the dais of "his honor."

"What is your name?"

The young man hesitated, looked at the justice with a look of one in doubt, and inquired:

"My name?"

"Yes, that's what I said!"

"John Milton."

The lips of the judge elongated with a lightning-like rapidity, then focused into a circle, and darted to a distance even with the extreme point of his nose. A familiar name, but a ridiculously unfamiliar man.

"Where do you live, Milton?"

Again the witness paused.

"I'm a waiter for Colonel Brown."

The colonel, by the way, was an intimate friend of the judge, a sport, and an acknowledged aristocrat of the village.

"Do you know the prisoner at bar?"

The witness turned to a black incarnate at his side, then back to the judge:

"I wonder what you're driving at judge, really I do."

The few spectators present relinquished for a moment the solemnity of court-room auditors, and imagined themselves at a side-show of a circus. The gavel sounded on the bar.

"Milton, I've a mind to fine you for contempt of court. Don't you forget that you're in a court-room! Now, take the oath and tell me what you know!"

The oath administered, the witness collected himself preparatory to saying "what he knew," and said:

"It's all a mistake, judge. Mr. Brown sent me here to ask you to come up to dinner and to play golf. To-morrow he's going on a hunting trip, and would like you to accompany him. That's all."

The court adjourned for two days.

To Haverhill, Massachusetts, belongs the honor of having given the best minstrel show on record. It was many years ago, and the circle was composed entirely of lawyers. The Hon. William H. Moody, the new Secretary of

the Navy, was interlocutor. There was no rehearsal, and when the curtain arose "our representative" came to the edge of the platform and said, "Janitor, lock the doors!" Then, turning to the circle he added in an undertone, "Come now, boys, follow me"; and the flow of wit that followed was something not to be forgotten.

A CERTAIN constituent has always been in the past a very devoted admirer of Congressman Cousins of Iowa, and has frequently indicated his friendship and intimacy with the Congressman by requesting copies of the public documents sent to him. He reads the Congressional Record from beginning to end, and has a strong liking for reports of the pure food commission, and other voluminous works prepared and distributed free of charge by the government.

At last requests for these documents began to arrive with such regularity that Cousins took up a collection among his colleagues, scraped up all the books and documents that he could find, sacked the mass and franked them through.

The devoted constituent made two trips to the office with a spring wagon to get the stuff home. A few days later Cousins received this curt note of thanks:

"Congressional library at hand. Many thanks. It will last me during your term of office."

A DETROIT millionaire who recently sat on a jury in justice court had only one real criticism to offer, and in that he deplored the lack of dignity displayed by attorneys and officers of the law while in the court. The same criticism has been made before elsewhere, and the difficulty may be explained by an experience a stranger had in a Missouri temple of justice. He was struck by the same lack of dignity and an odor of bad tobacco when he entered the courtroom.

"Who is the man with his hat on?" he asked of a native.

"The sheriff," replied the Missourian.

"And the man with his feet on the table and his hands in his pockets?"

"The prosecuting attorney."

"Now, who's the old guy with the straw hat on and no necktie, and the corncob furnace and the fumigating tobacco?"

"The judge."

"THE Council of State," writes the St. Petersburg correspondent of the London *Times*, "is now engaged in the consideration of the new Criminal Code, which has been drawn up by an expert committee of jurists. The criminal law at present in force is the old code of 1845, supplemented by various later enactments, and is no longer suited to the requirements of modern Russian life. The committee which is responsible for the new code has devoted some fifteen years to its task. The main feature of the revised code is that it does not seek, as is the case with the one at present in force, to define every separate crime which may be punished, but relies upon broad general definitions. Instead of the 1,711 paragraphs of which the old code consisted, the revised one contains about a third of that number, in spite of the fact that it deals with a number of crimes which were unknown, or practically unknown, in 1845, such as black-mailing, strikes and many others. It is interesting to note that strikes become criminal under the new code when they are directed against the Government, or when they lead to injuries to persons or damage to property. The old 'stair-case of punishments,' to employ a Russian phrase, finds no place in the new code. According to the old law, the lowest punishment was a 'reprimand,' and all other punishments were reckoned as equivalent to so many reprimands. The penal system was very complex, and included punishments of many kinds and grades, ranging from the reprimand to transportation and capital punishment. In the new code all this is done away with, and imprisonment of various degrees of severity becomes practically the only punishment. The committee even recommends the entire abolition of the death penalty. The new code endeavors to deal in a comprehensive manner with the difficult question of the estimation of the extent to which it is possible to hold a person responsible for acts committed in particular circumstances or in particular states of mind. This part of the code, which includes the definition of the principles of the responsibility of minors, is the work of the well-known jurist, Professor Tagantzeff, the President of the Department of Criminal Cassation."

If you don't want to be robbed of your good name, do not have it printed on your umbrella.

"A *viva voce* examination is popularly supposed to be a terrifying ordeal," says an English newspaper. "A candidate at a recent bar examination apparently did not find it so. When asked by the kindly examiner, who desired to put him completely at his ease, whether he was not the son of a certain eminent lawyer, the young man replied that he was, and added that he hoped he would receive full marks for the answer."

#### LITERARY NOTES.

THREE classes of the readers of Mr. Kidd's most popular book, "*Social Evolution*," will be disappointed in the present work,<sup>1</sup> which is a discussion of the principles of Western Civilization; their rise, progress and outcome. First: those who found easy and pleasant sailing in the first work, and shared the stoutly-maintained faith of the author that he was a Columbus discovering a new world. Second: those who hunted, with a joyous zest, Mr. Kidd's fallacies, that had just enough life in them to make the game worth pursuing. Third: those worthy clergymen who were delighted to find an evolutionist claiming that there can be no such thing as a "rational religion."

The first class will now find themselves in deep waters without a cork to hold them up; the second will not find fallacies so easily unmasked; the third will take fright in Mr. Kidd's insistence upon toleration in matters of religious thought. Toleration, the clergyman knows, is the open door through which the devil of doubt enters.

The book will be welcomed by all who see in a complacent adjustment to present conditions the enemy of progress. Mr. Kidd's friends will regret the frequent obscurities in style; the fearful reiteration of ideas and repetitions of phrase. Whatever corner in history one turns, he runs against Mr. Kidd's "Projected Efficiency." The innocent reader pauses before a specimen of Greek art. It is but a veil behind which stands "Projected Efficiency." He delves in Roman law; he sees Moses amid the thunders of Sinai; he pays his homage to the Christ; he reads of Roman persecution of the new faith;

<sup>1</sup> WESTERN CIVILISATION. By Benjamin Kidd. New York: Macmillan Company. 1902. Cloth: \$2.00; (538 pp.)

he sees that faith triumphant, and in turn facing a new enemy in its own household, heresies without number; history spreads its panorama; with the speed of Puck, Mr. Kidd girdles the earth, and everywhere "Projected Efficiency" is at work. With swimming head, the poor reader, like Emerson's Jacobin, who has heard too much of George Washington, cries, "Damn Projected Efficiency."

But more dispassionately let us interview this claimant to universal empire, and adjudge his claims.

Mr. Kidd sees "in the midst of our Western Civilization,"... "a vast process of change."... "Hitherto all systems of political and social philosophy have revolved around one principle; namely, the interests of existing individuals." There is going on now, a shifting of the centre of significance in the evolutionary hypothesis. "It is not the interests of those existing individuals, but the interests of the future" that make the new centre of significance. Up to the time of Mr. Kidd, evolutionary philosophers supposed that the fittest who survived in the struggle for life were those who best adapted themselves to the conditions of a present environment. This is still necessary but another factor is now added — adaptation to a future environment. Thus the "efficiency" which makes for survival is "projected" into the future. This, in a nutshell, is Mr. Kidd's discovery. The "winning qualities in the evolutionary process are those by which the interests of the existing individuals have been most effectively subordinated to those of the generations yet to be born."

This enables Mr. Kidd to present a striking antinomy. Between the interests of the present and the interests of the future there is an irreconcilable break. A sacrifice of the former to the latter is demanded. Yet this demand must not impair efficiency in the present. Just how Mr. Kidd would sacrifice the present without impairing present efficiency, he does not make clear, however.

The future must be "born out of a free conflict of forces such as has never been in the world before." Here Mr. Kidd makes one feel he is walking on solid ground. He sees that the ideal toward which the world is being carried "is that of a fair, open, and free rivalry of all the forces within the social consciousness —

a rivalry in which the best organizations, the best methods, the best skill, the best abilities, the best government, and the best standards of action and belief, shall have the right of universal opportunity. . . . It is the ideal which in its ultimate form must reach the limits of a stateless competition of all the individuals of every land, in which the competitive potentiality of all natural powers shall be completely enfranchised." Mr. Kidd strikes a noble and stirring note in his demand for the emancipation of every human power. He demands "a free conflict of forces towards equality of conditions, of rights and of opportunities." But, he insists, that is not the freedom of unregulated competition sought by the Manchester School of political economy. The doctrine of *laissez-faire* competition means a free fight in which unscrupulousness gains the day, choking all competition, bringing us "to the now universal tendency in modern industry to monopoly ownership, with the resulting accumulation of vast private fortunes through the enforced disadvantage of classes, of whole communities, and even of entire nations."

From the period of remorseless monopoly, now upon us, Mr. Kidd hopefully points to an "era in which increments in the private ownership of the instruments and materials of production which are unearned in terms of social utility shall form part of a common inheritance to which the energies and abilities of the individual shall be applied in conditions tending towards equal economic opportunity." This is the only really free competition. It will mean "the gradual organization and direction through the state of the activities of industry and production." This looks like Socialism, but Mr. Kidd has nothing in common with the current proposals of confiscation, and the regimentation of society. It is to be reached by the survival of those who adapt themselves to the conditions of this nobler future. Natural selection will destroy all opposing individuals and tendencies.

Would that we could share this faith! But whether or not Mr. Kidd is the Moses to lead us out of the wilderness of present conditions into that Promised Land where all will enjoy equal opportunities, he, at least, is a prophet, holding up an ideal, and spurring us on to its attainment.

NEW LAW BOOKS.

STUDIES IN HISTORY AND JURISPRUDENCE.

By *James Bryce, D.C.L.* New York: Oxford University Press, American Branch. 1901. Cloth: \$3.50. (xxiii + 926 pp.)

This is a revision of lectures and magazine articles representing the occasional labors of many years. The titles are:—

The Roman Empire and the British Empire in India; The Extension of Roman and English Law throughout the World; Flexible and Rigid Constitutions; The Action of Centripetal and Centrifugal Forces on Political Constitutions; Primitive Iceland; The Constitution of the United States as seen in the Past; Two South African Constitutions; The Constitution of the Commonwealth of Australia; Obedience; The Nature of Sovereignty; The Law of Nature; The Methods of Legal Science; The Relations of Law and Religion; Methods of Law-making in Rome and in England; The History of Legal Development at Rome and in England; Marriage and Divorce in Roman and in English Law; The Academical Study of the Civil Law (Inaugural Lecture, delivered at Oxford, February 25, 1871, on entering on the duties of the Regius Professorship of Civil Law); Legal Studies in the University of Oxford (Valedictory Lecture, delivered on resigning the Regius Professorship of Civil Law at Oxford, June 20, 1893).

The book was not made for professional readers exclusively. Indeed, the absence of technical language indicates clearly that the lay reader was chiefly in the author's mind. This is natural enough, in view of the fact that the pieces of work here revised were originally addressed to popular audiences, and not to bodies of lawyers or of law students. Yet the professional reader, though noticing that the style is diffuse, and that the information conveyed is consequently considerably less than one is accustomed to find in so many pages, may well enjoy these discussions as, in effect, a series of leisurely by-paths, starting from the law—though not too obviously—and returning to the law—though not too swiftly. We find here, in fact, the suggestive and entertaining discourses of a man who is acquainted with law, but not fatally attached to it, and who is consciously most at home when dealing with

questions of statesmanship and with broad generalizations of history. The author's taste for statesmanship is clearly the thread that binds together most of these studies; and since the appearance of the author's masterpiece, "The American Commonwealth," no one need say that whatever Mr. Bryce writes upon the history and theory of government is well worth reading.

To the American interested in constitutional questions, the most attractive of the essays are those on Flexible and Rigid Constitutions, The Action of Centripetal and Centrifugal Forces on Political Constitutions, and The Constitution of the United States as seen in the Past. To such Americans, however, as are lawyers rather than statesmen, the chief interest and timeliness of the book must seem to be found in the essays on The Extension of Roman and English Law throughout the World, Methods of Law-making in Rome and in England, The History of Legal Development at Rome and in England, and Marriage and Divorce in Roman and in English Law. Nothing but the French and Indian War and the Louisiana Purchase prevented the Roman Law from being the mother system for the greater part of North America; and by the approaching centennial celebration of the Louisiana Purchase this fact is just now brought home to American lawyers. Further, the insular possessions recently acquired by the United States, as well as the increasingly intimate relations of this nation with the business and politics of Cuba, Central America, and South America, bring to the American lawyer's mind in a very practical way the fact that the Anglo-American Law and the Roman Law have not yet divided the earth between them with such clearness and finality as to render it practicable for the person skilled in one system to ignore the existence of the other. From this same point of view it is interesting to read the two lectures with which the book ends, and in which the author discusses the value of Roman Law to the English lawyer.

A MANUAL OF THE PRINCIPLES OF EQUITY. By *John Indermaur*. Fifth Edition. London: George Barber. 1902. (xxxii + 574 pp.)

This treatise is written for students; therefore, the author strives to give plain and definite statements so that the student may grasp the



problem and be sure of the solution. In that this book succeeds; there are no discriminations piled upon discriminations, there are no cases piled upon cases. At the same time the selection of the cases for illustration shows skill; and the treatment of the authority shows understanding. For practical use the book has its limitations; there is not enough of citation, there is not complete mastery. The writer of this review has only examined with care the chapter on mortgages. That chapter was found of much information; it was to be noted that the principal rules were brought up for discussion, it was to be remarked that the latest case in point was always discussed. And yet in that chapter was found a failure to go to the root of the matter. For example, in *Stantley v. Wilde*, the English courts had held that a mortgage of a theatre could contain a provision that the mortgagee should have a share in the profits of the mortgagor; now in *Noakes v. Rice*, the English courts have just held that the mortgage cannot stipulate that the mortgagor shall use beer of the mortgagee in the public house. How can the one be held no clog upon the equity of redemption and the other be held to restrict the redemption? Our author states both cases as law; and yet that obviously cannot be.

A PRACTICAL AND CONCISE MANUAL OF THE LAW RELATING TO PRIVATE TRUSTS AND TRUSTEES. By *Arthur Underhill, M.A., LL.D.* Fifth edition. London: Butterworth and Company. 1901. Cloth: 17s. 6d. (lxvii + 400 + 69 pp.)

This manual does not profess to give an elaborate study of its subject, such as is to be found in *Lewin on Trusts*; rather it aims at a concise statement of underlying principles. In justification of his preference for modern rather than ancient cases as illustrations of these principles, the author quotes Sir George Jessel, — that "the rules of Courts of Equity are not, like the rules of Common Law, supposed to have been established from time immemorial. It is perfectly well-known that they have been established from time to time — altered, improved and refined from time to time. The doctrines are progressive, refined and improved; and if we want to know what the rules of Equity are, we must look rather to the more modern than the more ancient cases."

The scheme of the book is well carried out. The statements of principles are both concise and clear; the illustrations are ample, but are not so numerous as to overload the volume. In a word, this manual will be of practical use to the practitioner, and will give the student a workable knowledge of the law of trusts.

AMERICAN ELECTRICAL CASES, with annotations.

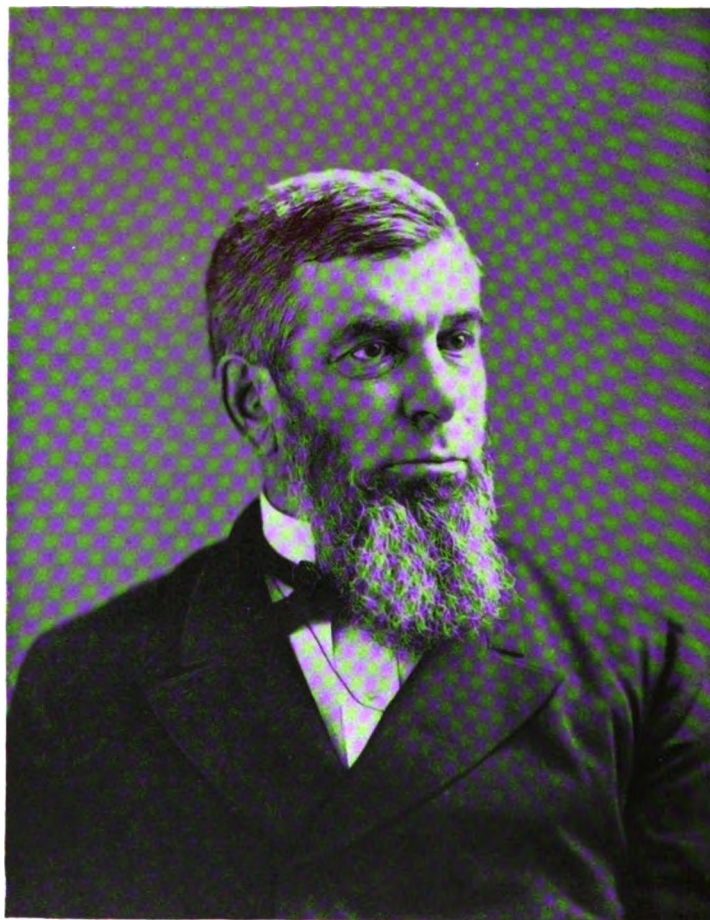
Edited by *William W. Morrill*. Vol. VII. 1897-1901. Albany, N. Y.: Matthew Bender. 1902. Law sheep: \$6.00. (xxiv + 940 pp.)

ONE's first thought on reading the title of this volume is that here, probably, is an example of over-specialization; but an examination of the cases here reported convinces one that there is, in fact, a sufficiently wide and important range of cases, properly grouped as electrical cases, to warrant a series of reports on this subject. The principal notes in these seven volumes cover for example, such diverse subjects as rights of abutting owners as to the use of streets for electric lines, duty of electric street railways to passengers and to travellers, electrocution, municipal control of street use, electrical appliances as nuisances, statutory protection to motormen, stock quotations by telegram, state control of telegraph rates, and underground wires, — to mention only a few of the many titles. The cases collected in this series contain the important cases (except patent cases) relating to various uses of electricity decided in the State and Federal courts from 1873 to 1901, the present volume covering the years 1897-1901. This seventh volume contains a good one-line index-digest for the whole series.

REPORT OF THE TWENTY-FOURTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION. 1901. (720 pp.)

In these yearly reports there are always one or more addresses which may rightly be called notable. In the present instance the annual address on "The Insular Cases," by Hon. Charles E. Littlefield, of Maine, and the paper on "Hamilton, the Lawyer," by Henry D. Estabrook, Esq., of Chicago, deserve this appellation; the first, an able and searching review of decisions which are as unsatisfactory as they are important, the second, an interesting study of Hamilton from a point of view practically neglected hitherto.





*M. R. Waite*

# The Green Bag.

VOL. XIV. No. 6.

BOSTON.

JUNE, 1902.

## MORRISON REMICK WAITE.

BY FRANCIS R. JONES.

UNLESS a lawyer is a politician or a genius the record of his life is bare of interest. The commonplace of petty detail and of ephemeral professional success does not stand the test of printer's ink. This is especially true of those lawyers whose career fell during the middle of the last century, before the accumulation and combination of capital made a successful attorney's life more picturesque, if not dramatic, by that test, which so appeals to the American mind, the munificent size of his fees. During those years the profession of the law was growing into a business. The old ideals were passing away. The old attributes and talents, without which no man could have hoped for professional preferment or a lucrative practice, became things of the past. Eloquence grew to be no longer prized. Profound learning became a handicap. The Year Books and deep reading in the science of the law became unessential. Business ability, common sense, took the place of a knowledge of the history and precedents of the common law and chancery. The science of jurisprudence became academic. Its study was left to those whose love of its principles was too great to submit to the seduction of the ignorant helter-skelter into which the active practice of the law degenerated. Unscientific pleading, corrupted by statute, did away with the necessity for, nay, the possibility of, a definite issue being joined. In sadness the learned watched these vanishings of a greater time,

while the world, scoffing, passed them by. The genius of the time, replete as it was with tremendous advancement in science and invention, could not stop to work out the new problems which were presented to jurisprudence. The impatient cry was, and still is, to sweep away all precedent, and to build anew from the foundation. If the science of jurisprudence is, as I conceive it to be, the application to human affairs of those principles of conduct which have been handed down and moulded through the years by the sages of the law, and which have been found by experience most conducive to right and justice, each new question being solved by the extension and development of the appropriate doctrine, the iconoclastic spirit of to-day may well be deprecated. To it is due the many and increasing conflicting decisions, the many and increasing dissents. It has been and still is a time of transition. The bases of the law are to-day unknown. It is difficult for a lawyer to predict with confidence the decision by a modern court upon any point of law, however long that point has been settled, and however numerous the precedents. Undoubtedly in time order will come again out of this chaos. The foundations and landmarks of our jurisprudence will cease to be obscured by shifting sands. The beacons of justice will again burn steadily in their appointed places. But it is questionable whether they will be the same beacons or the same landmarks that have

guided the English-speaking people out of barbarism. The ancient foundations of our law are more apt to be dug up piecemeal and used in the erection of a new edifice, unscientifically constructed by a modern legislature. The beauty and symmetry of the old structure will be lost, as were those of the Greek temples, whose walls were pulled down to build shepherds' huts. It is useless to stem the tide. One voice crying in the wilderness cannot and will not be heard. But I venture to point out that in this amorphous state of the law it is impossible to produce a great judge, a great legal administrator. It is not a time of building up, but of pulling down. A John Marshall would have no work to do. It is not a time of development along well-recognized lines, having their ends firmly fixed in great principles. A Chief Justice Taney or a Joseph Story would be an incongruity. The one judge, who, to those few who admire and cling to the older order, stands to-day pre-eminent and alone, is a glorious survival of that greater time, adorning his court with his learning, respected by all. Yet his reputation has not increased with increasing years and achievement, as it would have done three generations ago.

It was this tendency of the law that made possible the appointment, in 1874, of Morrison Remick Waite to the Chief Justiceship of the United States. He was a man of mediocre ability and attainments, who had never argued a case before the august tribunal over which he was called to preside, of no especial learning, but of a plodding temperament and unimpeachable honesty, of kindly heart and sensible head. He came of a family of lawyers, and was born at Lyme, Conn., in the house of his forefathers, on November 29, 1816. No biography of him has ever been printed. What little is now to be learned of his life must be gathered

for the most part from numerous short and anonymous obituary articles, filled with indiscreet and indiscriminate laudation, and from the forty-one volumes of the United States reports, 19 Wallace to 126 U. S., inclusive, in which are recorded his judicial opinions. Nothing is known of his boyhood. He was prepared at Bacon Academy, Colchester, Conn., for Yale, where he graduated in 1837, at the age of twenty-one, which at that time was at least two years beyond the average. William M. Evarts, Professor Benjamin Silliman and Samuel J. Tilden were among his classmates. Upon graduating he read law with his father, who, in 1834, had been appointed a judge of the Supreme Court of Connecticut, and in 1854 was translated to the Chief Justiceship of that State. One obituary notice that I have seen says that the young law student "traveled extensively" during the year that he was reading law with his father. Whither his journeys took him is not related.

In October, 1838, seized with the western fever, he went to Maumee City, Ohio, largely influenced no doubt by his uncle, Horace Waite, who had settled there in 1836. When the future Chief Justice reached Maumee the community had been rudely awakened from its golden dreams by the panic of 1837. The paper cities, so carefully laid out, were ruined. Broken credit and land poverty gripped the inhabitants in hardship. He entered the law office of Samuel M. Young, with whom, upon being admitted to the Ohio bar in 1839, he formed a partnership, which lasted until Mr. Young's retirement from practice in 1856. The wrecked state of credit and finance, the foreclosure of mortgages and the settling of bankrupt estates early made Mr. Waite conversant with land titles, the law relating to mortgages and negotiable paper, and gave him a peculiar facility in going through and understanding compli-

cated accounts. In such matters as these his professional career was engrossed, until, with the growth of prosperity and renewal of business, he naturally succeeded to conducting and settling business disputes and advising business men. He rode the circuit twice a year, where a powerful frame and strong stomach were essential to cope with the fatigue of poor roads and the disgust of bad food. These requisites Waite had, together with an equable temperament and unassuming manner. He was popular with his brethren of the bar, who trusted his rugged honesty and admired his simple character.

He kept aloof from politics, although in 1849 he was elected to the Ohio Legislature as a Whig from a strongly Democratic district, but retired at the end of his term. He moved to Toledo in 1850, when it became the county seat. He was an admirer of the "Great Compromiser," Henry Clay, and when the Whig Party broke up he naturally espoused the Republican cause. During the War of the Rebellion he steadfastly supported President Lincoln and lent some aid in raising troops. In 1862 he was nominated for Congress by a bolting convention, but was defeated in the election by Ashley, the regular Republican candidate, although he carried Toledo by a large majority. In 1863 he was offered, by Governor Brough, a seat upon the Supreme Court of Ohio. This he declined. I have seen it stated that he was again nominated and defeated for Congress, and that he again declined a seat upon the Supreme Court of Ohio, but no dates are given, and after some investigation I am inclined to believe that the statements are mistakes.

This record so bare and commonplace, with the additional fact that he was married in 1840, is all that we know of Mr. Waite's life up to 1871. It is easy to fill in the simple details, the domestic happiness and

peace, the constantly increasing income, the steady application, the widening circle of acquaintances and friends, the kindly hospitality. But there are no forensic triumphs, no reputation for great learning or ability, no peculiar adaptability or capacity. He was a safe man, unassuming and conscientious, scarcely known beyond the borders of Ohio, or perhaps, more strictly speaking, beyond the limits of Maumee County. His appointment by President Grant, in November, 1871, to represent the United States before the Tribunal of Arbitration at Geneva, came with a shock of surprise to the country, and to no one more than to Waite himself. He was in New York at the time, and had no intimation of his selection as one of the three counsel, until he received the telegram, forwarded from Toledo, announcing his appointment. In the work which then devolved upon him he proved himself the equal of his two colleagues, Evarts and Cushing. His power of steady application, of mastering details and arranging them in logical order, made his argument before that International Tribunal upon the question of England's liability for allowing Confederate cruisers to coal in British ports, effective and unanswerable. His forensic antagonist, Sir Roundell Palmer, raised in the following year to the peerage as Lord Selborne, was overwhelmed. That argument undoubtedly was the greatest achievement of his life. In recognition of it he was given the degree of Doctor of Laws by Yale in 1872, and to it he owed his elevation to the Chief Justiceship of the United States. He returned from Geneva to resume his practice at Toledo, and in January, 1873, upon the motion of Caleb Cushing, was admitted to the bar of the Supreme Court of the United States.

On May 7, 1873, Mr. Chief Justice Chase died. President Grant offered the vacant place to Roscoe Conkling, who declined it.

The President then nominated successively Attorney-General Williams and Caleb Cushing to the Senate to be Chief Justice. These nominations he successively withdrew when he found that they would not be confirmed; and, on January 20, 1874, he sent to the Senate the name of Morrison Remick Waite for Chief Justice. Mr. Waite was unanimously confirmed. His commission was dated January 21, 1874, and he took the oath of office and his seat upon the bench on March 4.

This high office came to the Chief Justice unsought, and was due partly to the effective instigation of his friend, Columbus Delano, who was Secretary of the Interior, and partly to the President's desire to acknowledge and pay the debt owed to peace by the work of the United States counsel at Geneva. At the time of the nomination Mr. Waite was presiding over the Constitutional Convention of Ohio, to which he had been unanimously elected a delegate in the preceding April. Upon the organization of the convention he was elected its president. A telegram to one of the delegates announced the nomination to the Chief Justiceship, and the first knowledge Mr. Waite had of his elevation was a motion from the floor of the convention, stating the fact, and proposing an adjournment in order that the members might congratulate him. He calmly ruled the motion out of order.

The time between his appointment and his taking his seat upon the bench he occupied chiefly in preparation for his new duties. Consider the situation. The practice and jurisdiction of the Supreme Court of the United States were hitherto undiscovered countries to him, as were admiralty and constitutional law, to say nothing of land grants, Spanish land titles and civil law. He came to the court, too, at a difficult time. The meaning of the new amendments to the

Constitution had yet, for the most part, to be defined and settled. The constitutionality of the Reconstruction Acts and the powers of Congress in regard thereto largely remained unconstrued. Again, the legislation of the States took a new and untried direction along socialistic and paternal lines, as evidenced by the Prohibition Laws and the fixing a maximum rate to be charged in certain businesses, like operating a railroad or a grain elevator. How far the States might go in these directions was to be established. And in a class all by themselves were the Sinking Fund Cases, 99 U. S. 700, with their celebrated and delicate questions of law. The task which was set him was rendered more difficult by the amorphous state of the court, which reflected the unsettled and transitory condition of the country, at that time not yet recovered from the Civil War.

When all these things are taken into consideration, it is amazing that the Chief Justice, being the man that he was, proved himself as adequate to the place as he did. For, although by no means a great lawyer or a great man, he fulfilled the duties of his high office with distinct credit. His conservatism, his conscientiousness, his faithful application, stood him in place of genius. His kindly modesty won him the respect and confidence of his associates upon the bench. The predominance of one great mind, which shaped and moulded the course of judicial decision and policy, is not apparent. There were greater lawyers and abler men upon the Supreme Court than the Chief Justice. And this naturally made his position the harder. But his great good sense steered him through all the shoals and breakers. I can think of no principle of constitutional law which was developed during his incumbency of the Chief Justiceship that has not stood the test of time and is not acknowledged to be right. But I shall not refer to any of the important

cases which were adjudged during the fourteen years that he sat upon the bench. In the first place those cases are too numerous even for cursory mention here. In the second place the opinions in many of the most important were written by other members of the court. In the third place the opinions delivered by the Chief Justice, although almost always terse and logical, certainly do not rise to any high level. And in the fourth place it would be impossible to select the cases in which the Chief Justice delivered opinions, isolate them from the woof which the whole court were weaving, and give an adequate or just impression of his individual work and influence. For he was only an integral part of what proved to be, in the aggregate, an able and satisfactory court. The whole course of decisions by the Supreme Court during the fourteen years from 1874 to 1888 must be reviewed before any true conception of Mr. Chief Justice Waite's place in our judiciary can be rightly determined. Such an exposition would be both important and interesting, but it lies beyond the scope of this article. Mr. Chief Justice Waite's career on the bench justifies and illustrates Mr. Charles A. Kent's remarks: "A judge can give his entire time and all his strength to the duties of the place. A man who, with such opportunities for education, does not make an able judge, must be poorly endowed by nature with legal ability. The highest judicial capacity is of course rare, but the lawyers are numerous who can fill respectably seats in our highest judicial tribunal."

Mr. Chief Justice Waite's personality was uninspiring. He was thickset and not above medium height. His head was massive and set upon massive shoulders. Although courteous he was prompt in the dispatch of business. This in itself was a peculiar virtue, for with the Supreme Court four years be-

hind its docket and constantly increasing business, an administrative ability was of the highest importance. Happily the Court of Appeals Act has now relieved this tension. The Chief Justice by his kindness and fairness won golden opinions upon the circuit from a bar, the leaders of which for the most part had been arrayed in arms against their country's authority, and were in a sullen temper, aggravated by the disgraceful episodes of the reconstruction period. His mind, which carefully weighed both sides of an argument and never jumped at conclusions, was eminently judicial, although it is safe to say that he never mastered the technicalities of practice in the Supreme Court. He was a man to win public respect and confidence by his domestic virtues and his unselfish singleness of purpose. With characteristic humility he entered upon his exalted duties with no illusions of greatness, and when within a few months his name began to be mentioned for the nomination to the Presidency he quietly and firmly let it be known that he considered any such ambition derogatory to his high office, saying that a man who tried to make the Chief Justiceship a stepping-stone to the Presidency was unworthy of either office. To his most creditable stand upon this question is undoubtedly due the permanent taking out of politics of the members of the Supreme Court; for the unfortunate ambition and conduct of Mr. Chief Justice Chase had tended much to accustom the public to the unhappy contingency of seeing the Justices plunged in factional struggles for political office.

It is a curious and interesting coincidence that the first case in which Mr. Chief Justice Waite delivered an opinion, *Tappan v. Merchants' National Bank*, 19 Wall. 490, Mr. Chief Justice Fuller, then at the bar, unsuccessfully argued for the appellee. An-



other episode must be mentioned here. In the summer of 1885 the Chief Justice went to England to recuperate his health, and as the guest of the Lord Chief Justice of England, Lord Coleridge, sat upon the bench with him. He also received much attention from Lord Bramwell, Lord Fitzgerald and Barons Huddleston and Pollock. But the *Albany Law Journal* took umbrage because the Chief Justice of the United States was not tendered a banquet and publicly fêted, as the Lord Chief Justice had recently been in the United States. The rather puerile remarks of the above-mentioned periodical, which, among other things, stated that the Lord Chief Justice had gone soundly to sleep upon the bench of the Supreme Court of the United States, came to the notice of Lord Coleridge, who took the pains to reply in a letter of explanation and deprecation. As a matter of fact it appears that every courtesy and attention were shown to the Chief Justice of the United States in England that were possible or that he expected or desired.

On March 17, 1888, the Chief Justice caught a severe cold. On March 19 he was

too ill to deliver his opinion in the Telephone Cases, 126 U. S. 1. This was done by Mr. Justice Blatchford for him. Upon the conclusion of the case he retired from the bench, never to sit there again. He was up and about the house for the three succeeding days. There was no apparent danger. On March 22, however, he became much worse, and died the following morning of pneumonia. He was buried at Toledo with all the ceremonious respect due to his high office.

The judgment of an anonymous writer in 22 *American Law Review*, 301, 303, seems so eminently just that in conclusion I transcribe it here: "That he should develop any great strength as a judge was not to be expected of him, and the public expectation was not disappointed. He seems, however, to have been entirely destitute of that vanity which makes men of humble capacity so dangerous when called upon to discharge the duties of great offices. In fact he was modest, conscientious, careful, conservative, and safe. He did nothing to lower the dignity of the great office which it was his lot for fourteen years to fill, and this is perhaps as much as will be said of him in future times."



**THE EVOLUTION OF THE AMBULANCE CHASER.**

By L. G. SMITH.

IN THE YEAR 2.

A WAY back in primeval times, when Mother Earth was new,  
There wandered aimlessly through space, its mysteries to view,  
Two spirits from another world, some shining, distant star,  
To note the change resulting from the last creative jar.

"Aha," cried one, "methinks I see another little world,  
Which from creation's workshop hath recently been hurled.  
Let's hie us to this new-born globe. I'd dearly love to see  
What kind of living creatures its inhabitants may be."

They rested on our Mother Earth, and paced its barren strand.  
It was void of population, a rocky, sterile land.  
No green thing grew upon its face, nor flower, nor vine, nor tree,  
While far beyond them as they stood, there stretched the shifting sea.

Upon its glassy surface those spirits gazed with awe,  
Struck dumb with consternation at the carnage which they saw;  
For its waves were thickly peopled with creatures hard of shell,  
With eyes protruding from their heads, whose presence was a knell

Of death, to any living thing within those waters black,  
If once those awful scavengers should get upon their track.  
One spirit spoke, "What are those fiends, who feed on luckless mites?"  
The other answered, "From their nerve, I'm sure they're trilobites."

IN THE YEAR 1902 A.D.

When many eons rolled along, these spirits did return  
To visit Mother Earth again, its present state to learn,  
How vast the change! The desert spot had blossomed into flower;  
Where once was dearth and barrenness, now countless cities tower.

A myriad peoples crowded where once no foot had pressed;  
They ruled the land, they tilled the soil, they rode the billow's crest.  
Man's mind had chained the elements to do man's mighty will;  
Man's work had left its imprint on harbor, vale and hill.

The spirits gazed in wonder upon the surging throng;  
The haughty and the humble, the feeble and the strong;  
Each in a feverish scramble to reach a common goal,  
The great almighty dollar, regardless of his soul.

And fiercest, midst this monster host, were by the spirits seen  
 A swarming brood of creatures of a most rapacious mien,  
 Who pushed and crushed and struggled to lead in the array,  
 While, like vultures over carrion, they gloried in foul play.

"Who are these greedy objects who swarm the city street?"  
 The spirits asked of an old friend, whom they had chanced to meet.  
 "Oh those, sirs, are the lawyers who in accidents delight,  
 The chasers of the ambulance, — the modern trolleybite."

### ANIMALS IN COURT.

By M. E. E. KERR.

SIR MATTHEW HALE declared that the fountain head of the English law is as undiscoverable as the source of the Nile. Certain it is that its early institutes have been traced as far into the dim mists of the past as the "foundations of a titled family," or the "genealogical tree" of some Anglo-manics.

In the twilight of dawning intelligence, during the reign of the era of religious superstitions, some strange conceptions of law and legal procedure were entertained, some queer practices indulged, and some novel trials recorded. At these times, appearances passed as facts, and circumstances, because of their probative force, were made to take on the form of positive truth.<sup>1</sup>

It was during this time that wager of battle, ordeals by fire and water, and trial by combat prevailed, and thieves were caught in a novel manner,—by key and Bible. According to the old chronicles, to determine whether a suspected person was the veritable thief, the triers would put a key into the midst of a Bible and clasp or tie the Bible tightly on it; they would then hang the key on some man's finger, by putting

the finger into the hollow, or ring, of the key-handle. Then one of the triers would repeat a passage from the Psalms, commencing as follows: "When thou a thief dost see," etc., to the words; "To use that life most vile," etc.<sup>2</sup> One of the triers would then name over the persons whom it was suspected might be guilty of the theft. If the Bible thus held turned when a person's name was called by the trier, he was judged to be the thief.

Curious as it may seem in this day and generation of enlightenment, dumb animals have actually been regularly indicted, formally arraigned in court, systematically tried and solemnly executed in the same manner as human felons! It is recorded that in the year of Christian civilization, A.D. 1314, a bull, having killed a man by playfully tossing him on his horns, was brought before the judges in the province of Valais, having been indicted as an ordinary homicide, and after several witnesses had given evidence for the prosecution (we are left in the dark as to whether the brute-defendant put in the plea

<sup>1</sup> Thus, evidence of "flight" was made proof positive of the guilt of any one accused of treason or charged with a felony. This matter is fully discussed by the writer in an article in the *Central Law Journal*.

<sup>2</sup> The record refers to Ps. i, 19, 20. The writer does not know what version was used, but feels quite sure it was not the Protestant Bible in common use now-a-days, that is, the King James translation, which has but six verses in the first chapter of Psalms. The writer confesses that after some search the passage supposed to have been quoted by the triers has not been found.

of self-defense, extenuating circumstances, justifiable homicide, or stood mute,—the record being silent as to the defense interposed or the evidence offered on the part of the defendant), was condemned to be hanged. This sentence was thereafter confirmed by an order of parliament and carried into effect.<sup>1</sup> On another occasion, in the province of Burgundy, an unfortunate pig, which had happened to kill a child, was in like manner regularly indicted, solemnly tried in open court, and duly sentenced to be hanged, and was thereafter executed.<sup>2</sup>

This was in accordance with the old law of France, which provided that if a vicious animal killed a person, and it was proved that its owner knew of its propensity to attack people, and negligently permitted it to go at large unattended, he was to be hanged, and

<sup>1</sup> Fournel, tom. 1, p. 119.

<sup>2</sup> Id. p. 289.

the animal also. This was making the doctrine of *scienter* much more formidable than has ever been known to the English law.

The writer has read somewhere, but has been unable to recall where, of a trial in England in an early day, in which the dog of a sheep-stealer was sentenced to be hanged with his master, doubtless due to the influence of the Norman notions of law and procedure brought over by the conquerors and engrafted onto the Anglo-Saxon administration of the criminal law.

In the Exchequer records of 24 Edward I.<sup>3</sup> there is an account of a writ being issued to the sheriff to take possession of an unfortunate whale which, in a spirit of sportive venture, or in urgent pursuit of a dinner, ventured into dangerous waters, was washed ashore and stranded in the county of Essex.

<sup>3</sup> Mem. in Scacc. H. 24 Edw. I.

## A LEGAL STUDY OF ST. PATRICK.

By JOSEPH M. SULLIVAN.

THE *Senchus Mor*, a Gallic manuscript containing the largest part of the Brehon Code, was compiled in the first part of the fifth century, and was therefore in full force and effect when Saint Patrick first set foot on the shores of Erin. Sent there by the Pope in the year A.D. 432, Saint Patrick found that there existed in ancient Ireland a system of laws in which the property and personal rights of individuals were minutely regulated. He found also that the rights of women in lands of their husbands were jealously guarded. The wife had the right to alienate a portion of her husband's land, and to control to some extent her husband's right of alienation. Schooled as he was in Roman law, Saint Patrick discovered that

the ancient Irish law governing the distribution of estates of deceased persons left nothing to be desired in the matter of compilation and amendment. He was surprised to find a complete system of legal ethics, a court, a judge, and enlightened procedure for the enforcement of its decrees. He found that the courts employed in the enforcement of their judgments, writs and processes resembling those of distress, and other legal forms commonly used in early English procedure. He found, also, that the rights of creditors were protected, as, for instance, sureties were made liable somewhat after the old English institution of frank-pledge.

Saint Patrick soon learned that the ancient Irish needed no instruction in legal ethics,

and he immediately directed his efforts to harmonize their laws with the doctrines of Christianity. Saint Patrick's opinion of the native code, we find in his own words in the introduction to the *Senchus Mor*: "What did not clash with the Word of God, and the consciences of the believers, was confirmed in the laws of the Brehons, for the law of Nature had been right except as to the faith, and the harmony of the church and people."

With the advent of Saint Patrick and Christianity into Ireland, came the introduction of canon law in all its varied forms. This introduction of canon law into Ireland and the establishment of ecclesiastical courts in every district, and the usurping of pleas belonging to the crown, caused great confusion and internal disorder. The Irish had such a profound respect for the superior knowledge of their priest that in all cases, even in matters of life or death, his word was considered supreme. This conflict between secular and ecclesiastical tribunals is of very ancient origin. St. Paul, in preaching Christianity in the early days, cautioned the faithful against dragging each other before infidel judges. We find instances where even the termoners or tenants of the ecclesiastical lands exercised judicial functions, and decided the ordinary disputes of their locality. For example, Valentinian III decreed that clerics might be tried before a bishop, with consent of both parties. Under the Gothic kings, it was not allowed for a cleric to appear before a secular tribunal. Down to the time of the Reformation in the sixteenth century, the exclusive right of the church to dispose of testamentary, matrimonial and defamatory cases was undisputed. This state of affairs caused great dissatisfaction and endless controversy. It was well-

nigh into the seventeenth century before the secular courts established a secure foothold upon the jurisprudence of Ireland, and placed the judiciary of the country upon a firm basis.

A single illustration of Saint Patrick's work in Ireland will give the reader an adequate idea of his labors in the field of legal study and revision. "Saint Patrick requested the men of Erin to come to one place to hold a conference with him. When they came to the conference the Gospel of Christ was preached to them all. And when they saw Laeghaire and his druids overcome by the great science and miracles wrought in the presence of the men of Erin, they bowed down in obedience to the will of God and Patrick, in the presence of every chief of Erin. It was then that Dubhthach (pronounced Dhoovah) was ordered to exhibit the judgments and all the poetry (literatures) of Erin, and every law which prevailed amongst the men of Erin, through the law of nature, and the law of seers, and in the judgments of the island of Erin, and in the poets. Now the judgments of true nature which the Holy Spirit had spoken through the mouths of the brehons and just poets of the men of Erin from the first occupation of the island down to the reception of the faith were all exhibited by Dubhthach to Patrick."

Christianity can hardly repay the debt it owes to Saint Patrick. His searching and convincing logic dissipated the darkness of paganism that had overspread the land, and planted the seeds of Christianity never to be uprooted. Posterity will place his name as a law-giver with that of Moses, and jurists will rank him with Theodosius, Justinian, and Solon, for his noble efforts in the arduous field of legal study and research.

## CHRISTIANITY AND THE COMMON LAW.

BY ARTHUR WILLIAM BARBER.

The massive cathedral of the Catholic; the Episcopalian church with its lofty spire pointing heavenward; the plain temple of the Quaker; the log church of the hardy pioneer of the wilderness; the mementos and memorials round and about us; the consecrated graveyards, their tombstones and epitaphs, their silent vaults, their mouldering contents all attest it. The dead prove it as well as the living. The generations that are gone before speak to it and pronounce it from the tomb. We feel it. All, all proclaim that Christianity, general, tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and the fagot are unknown, general, tolerant Christianity, is the law of the land. — *Daniel Webster*.

IN the foregoing passage, a great American statesman and jurist has recorded his opinion of the place of Christianity in the common law of our race. Text writers have reiterated and courts have affirmed this maxim that Christianity is part and parcel of the common law. Owing its origin to so eminent a jurist as Lord Chief Justice Hale,<sup>1</sup> it has received the sanction of Blackstone,<sup>2</sup> of Wilson,<sup>3</sup> and, in a measure, of Story<sup>4</sup> and of Kent.<sup>5</sup> On the other hand, the proposition has excited the ardent wrath and unsparing denunciation of that high priest of democracy, Thomas Jefferson, who pronounced this "adoption in mass of the whole code of another nation and its incorporation into the legislative system by usurpation of the judges alone, without a particle of legislative will having ever been called on, or exercised toward its introduction or confirmation... the most remarkable instance of judicial legislation that has ever occurred in

English jurisprudence or perhaps in any other."<sup>6</sup> Others perhaps have been as ready to accept the doctrine and echo the maxim as Jefferson was eager to reject and overthrow it, without finding it necessary to understand or explain its meaning, or to examine the grounds upon which it rests.

The importance of the proposition, however, will well repay a searching inquiry into its history, its justification, and its scope. And, perhaps, after all, it will then be found that, like many another time-honored maxim, it needs to be explained and limited, rather than defended or disproved, and that when it is thus elucidated and confined it will cease to be a subject of dispute. Much of the argument heretofore expended upon it has doubtless been misdirected, and many of the controversies to which it has given rise have been due to misunderstanding, rather than to essential and irreconcilable differences of opinion.

If Christianity as a religion, as a system of doctrines based on faith and sanctioned by a divine approval, is part of the common law, it must be one of the functions of our courts, — and surely none can be more important, — to determine the standard of Christian faith, to pass upon the correctness and conformity of religious belief, and to punish by appropriate penalties, as offences against the State, non-conformity in opinion or disobedience in conduct to the precepts and doctrines of Christianity as judicially interpreted and declared. Unless this power is inherent in our courts, Christianity is a law without a sanction, and becomes an absurdity in logic

<sup>1</sup> *King v. Taylor*, 1 Vent., 293: 3 Keb., 607.

<sup>2</sup> *Blackstone's Commentaries*, Vol. IV, p. 59.

<sup>3</sup> *Wilson's Lectures on Law*, Vol. III, p. 112.

<sup>4</sup> *Vidal v. Girard's Executors*, 2 How., 127 (198).

<sup>5</sup> *People v. Ruggles*, 8 John. (N. Y.), 289.

<sup>6</sup> *Reports of Cases etc. (Virginia)*, by Thomas Jefferson, Charlottesville. Published by F. Carr & Co., 1829. Appendix.

as well as a nullity in fact.<sup>1</sup> Thus was Catholicism the law of France and Spain in the days of the Inquisition; thus Episcopalian Christianity is by statute the law of England, and was when Baptists and Unitarians were burned at the stake<sup>2</sup>; thus Puritanism was the law of Massachusetts, when Quakers died for their religious belief. Thus Mohammedanism was the law of the East, when faith in the Moslem's god and obedience to his prophet were inculcated by the sword. Thus was her religion the law of Rome when it was written as the first principle of her legal system, "*Jurisprudencia est divinarum atque humanarum rerum notitia*."<sup>3</sup> Thus was their religion the law of the Jews when the great lawgiver commanded "Thou shalt have no other God before me." Thus in the beginnings of society is religion ever the law of the state, when the sanction of all laws is divine rather than human, and there is no law but the precepts of religion. When church and state are one, then it may properly be said that the religion of the community is the law of the land. The separation between church and state, between religion, and politics, is a development. All that we know of the history of society and of the growth of institutions requires us to believe that at some stage in the evolution of the civilization which is ours, religion and law were one. The question to be determined is whether, in the records of the common law as they remain to us, we can trace the continuance of that union in an alliance between Saxon politics and the religion of Christ, or

whether that process of separation had so far advanced at the beginning of English legal history that we are able to affirm that no record of such an alliance is left to us.

The argument in which Jefferson seeks to refute the maxim that Christianity is part of our common law proceeds upon the assumptions that the common law of the Saxons became an arbitrary system, cut, dried and finished at the date of Magna Charta; that no subsequent additions, modifications or qualifications could result but by legislative enactment; and that if, before Magna Charta, Christianity had ever become portion of the common law, some written record of its incorporation therein would attest the fact. It may well be believed that when the great statesman framed this argument he had felt the influence of a retainer from democracy. The truth is that the common law was before Magna Charta, and has continued to our own day to be a vital and growing system, and principles have been again and again imported into or engrafted upon it for which legislation has given no warrant. Such in effect is each new recognition by the courts of the requirements of public policy, each declaration that acts and conduct once in keeping with the ruder manners of earlier times have ceased to accord with the moral sentiments of society.<sup>4</sup> To the whole course of Jefferson's reasoning, therefore, this may be interposed as a sufficient answer: the precepts and doctrines of Christianity may not have been part of the common law before Magna Charta, may never have been made such by any affirmative legislative action, yet may have so become by gradually acquiring in the consciousness of the English race a recognition as the basis of all law because the basis of all morality. The judicial enunciation by Chief Justice Hale of a principle

<sup>1</sup> Duer, J., in *Andrews v. Bible Society*, 4 Sandf. (N. Y.), 156; *Board of Education v. Minor*, 23 Ohio, St., 210.

<sup>2</sup> The statement of Justice Selden that "worship by Unitarians and the preaching of Unitarian doctrines... were a crime both by the common law and under the statute" is incorrect. The cases he cites as authority show only that adherence to this faith was a statutory crime. *Robertson v. Bullions*, 11 N. Y., 243.

<sup>3</sup> *Institutes of Justinian*, Liber I, Tit. 1.

<sup>4</sup> Of the right of the husband to chastise the wife "reasonably," for purposes of discipline, see *Perry v. Perry*, 2 Paige (N. Y.), 503; and 70 N. C., 60.

foreign to our law could not make it in fact a part of that law, but a system which by the growth of centuries had acquired the right to be regarded as the foundation of ethics, and the determinant of right and wrong in conduct, may well have received at the hands of this eminent jurist its first judicial recognition, its first official reception into the body of English law. Certainly we need see in this utterance of the learned Chief Justice<sup>1</sup> only the acknowledgment of an accomplished fact, not the arbitrary enunciation of a novel principle. It is thus that systems of jurisprudence grow. It is never the growth that is recorded but the results thereof.

However, a reference to other utterances of the same judge enables us to understand the meaning which he attached to the words in question, and shows that he meant them in the strictest sense, that nonconformity with the established religion was punishable as a crime by the common law of England; for he has declared<sup>2</sup> that a heretic convicted by the diocese and refusing to abjure might by the common law be delivered over to the secular power for punishment, by virtue of the writ *de hæretico comburendo*, and the existence of such a writ in the register is pointed out as evidence of the fact. But the authority of this evidence has been destroyed by Lord Commissioner Whitlock, who shows<sup>3</sup> that the writ did not occur in the ancient manuscript registers, but was of later date, brought in by Archbishop Arundel in the reign of Henry IV. for the suppression of the Lollards. However that may be, the existence of such a writ were poor authority for the assertion that Christianity is part of the common law. Doubtless it might show that sectarian Christianity, that of the established

church, was a part and an important part of the English law; but that one form of Christianity should condemn another to the stake were no argument for the existence of Christianity as a faith in the body of English law, common or statutory. The established error in the evidence upon which he relied has, however, discredited the opinion of Lord Chief Justice Hale, and has taken from his maxim whatever weight it may have had as authority for the common law jurisdiction of the courts in matters of religious faith. The writ was in fact an invention of the church, which coerced the state for unholy ends.<sup>4</sup>

It may now therefore be confidently asserted that the common law of England knows no prosecution for religious belief; that there has never been a single instance, from Saxon times to our own day, of punishment inflicted for erroneous opinions upon rites or modes of worship save by force of some positive law; that apostasy, heresy and nonconformity and all that class of offences against the established church are creatures of express legislation and exist only on the statute books<sup>5</sup>; that Christianity as a system of theology miraculously revealed is not the basis nor any portion of the common law.<sup>6</sup>

As for the jurisprudence of America, any alliance between religion and the state is as foreign to our religious ideas as to our principles of polity. The golden rule of Christianity cannot be enforced by the sword of civil authority. The weapons of its faith are spiritual not temporal, and by these must it

<sup>4</sup> Pollock and Maitland's History of English Law, Vol. II, pp. 549, 550.

<sup>5</sup> Harrison v. Evans, 2 Burn's Ec. Law, 218; s. c. 3 Bro. Parl. Cas., 470; 4 Blackstone's Commentaries, Chap. 4; Commonwealth v. Kneeland, 20 Pick. (Mass.), 206 (235).

<sup>6</sup> Coggs v. Bernard, 2 Lord Raymond, 919; Burr v. Parish, 9 Mass., 298; Field v. Field, 9 Wend. (N. Y.), 401; Miller v. Gable, 2 Denio, (N. Y.), 517; Hale v. Everett, 53 N. H., 1 (205); State v. Chandler, 2 Harr. (Del.), 553; Board of Education v. Minor, 23 Ohio St., 210; Uptegraff v. Com., 11 Serg. & R. (Penn.), 407; Andrews v. Bible Society, 3 Sandf., 351 (378).

<sup>1</sup> King v. Taylor, 1 Vent., 293; 3 Keb., 607.

<sup>2</sup> 1 Hale's Pleas of the Crown, 392, 405, 709; 4 Blackstone's Commentaries, 97; Hale v. Everett, 53 N. H., 1 (208).

<sup>3</sup> Nayer's Case, 5 How. St. Tr., 825; Commonwealth v. Kneeland, 20 Pick. (Mass.), 206 (235).



stand or fall. Nor do we regard religious belief as within the cognizance of political power. Security in opinion, and freedom of worship to all mankind, are among the first rights declared and protected by the constitutions of our several States. And this we must regard as our American system, wherein the favor extended by the policy of English statutes to an established church and an approved creed has been superseded by religious liberty and the equality of faiths. The conclusion of the matter must then be this — the maxim that Christianity is a part of the common law in the sense attributed to the words by their learned author is a recognition of the alliance between church and state in England, a relic of the days when the clergy ruled the bench and swayed the minds of the judges under a sacerdotal domination that was never questioned, when the gown was an accomplice in the frauds of the stole, and the priesthood held society in bondage and intellect in subjection.<sup>1</sup>

But if the maxim of Lord Chief Justice Hale was in its broadest sense untrue and misleading, if there has never been inherent in our courts of common law any jurisdiction to enforce the observance of the outward forms of this religion, or conformity with its doctrines and precepts, it is yet true that we are a Christian people, that Christianity is closely interwoven with the texture of our society and intimately connected with all our social habits, customs and manners of life. Our ideas of public order, decorum and decency are based upon it. Many of the best features of the common law, particularly those which regard the family and social relations, which compel the parent to support the child, the husband to maintain the wife, which make the marriage tie permanent and forbid polygamy, which enforce respect to

the dead and protect the sanctity of the grave, which encourage gifts to charity and favor that which promotes the interests of the Christian faith, if not derived from Christianity directly, have at least been improved and strengthened by the prevailing religion and the teachings of its sacred Book.<sup>2</sup> We may therefore expect to find that the criminal law, shaped by our ideas of public decorum, and designed to protect the sensibilities, feelings and opinions of the people from such malicious outrages as might tend to disturb the public peace or order, animadvert upon many acts which tend to shock the moral sense or offend the propriety of a community of Christians whose sense of public decorum has been shaped by the influence of certain evangelical creeds and by the precept and example of the gentle Nazarene. Thus it is at common law an indictable offence maliciously to disturb a grave, because it is an outrage upon prevailing ideas of decency, and an act calculated to provoke a breach of the peace. That this offence is a crime, may very probably be in large measure due to the fact that the doctrine of corporeal resurrection is a part of the popular religion. But certainly no one would think of claiming that this doctrine is therefore established or approved by law, or is any more lawful than any other opinion touching the future life. It cannot be argued that a particular system of theology is in any proper sense either established or recognized as the law of the land, by a mere effort to preserve peace and order through police regulations adapted to the actual condition of a people by whom that theology is in fact accepted and its precepts observed.<sup>3</sup>

If, therefore, the prevalence of the Christian religion, the existence in the community

<sup>1</sup> Reports of Cases etc., *supra*; Hale v. Everett, 53 N. H., 1 (209).

<sup>2</sup> Williams v. Williams, 8 N. Y., 324; Cooley's Constitutional Limitations, p. 472.

<sup>3</sup> Hale v. Everett, 53 N. H., 1 (203).

of a moral sense nurtured by its teachings, the protection of this moral sense from outrage by penal sanctions are not in themselves sufficient to justify the maxim of Lord Hale, we may further inquire whether there be any act, in its essential nature an offence against religion, which is nevertheless cognizable by the civil authority and punishable as a crime. We find such an offence in blasphemy, which may be defined as the malicious reviling of God or of religion, contumelious reproach or profane ridicule of the sacred Scriptures.<sup>1</sup> That this offence is by the common law a crime, has not admitted of a doubt for many generations. The facts before Lord Chief Justice Hale at the time when he framed his much disputed maxim before referred to,<sup>2</sup> brought up for his determination this specific question, and, in so far as concerns the question then decided, his authority has remained unshaken to the present day. The grounds upon which the learned Chief Justice based his decision were that wicked, blasphemous words were not only an offence to God and to religion, but a crime against the laws and the State, as tending to weaken all moral obligations and thereby to subvert the foundations of civil government. Society has not yet advanced to that stage where government can afford to throw away the protection of religion and stand upon the sole ground of expediency. So long, therefore, as it must depend for its ultimate justification to the popular mind upon a divine sanction, so long must it look back to religion, and in a Christian country to the religion of Christianity, as its starting point. With reason, then, may it be said that what strikes at the root of Christianity or at the truth of religion is not only a menace to the public peace, but a blow aimed at the integ-

ity of government itself. With reason, therefore, and with perfect justification may a government so constituted punish, in self-defense, whatever tends to its destruction.

A long series of cases in English law have followed and affirmed the principle of this decision. All profane scoffing at the Holy Scriptures, all exposure of them to contempt and ridicule, all attacks upon the broad truths of Christianity, all ridicule of the life and miracles of Christ, all scoffings at his divinity and all utterances calculated to reflect upon his mission and his work are, within the principles of these decisions, blasphemous libels and therefore crimes at the common law.<sup>3</sup> The principles of these decisions have been carefully limited not to interfere with differences of opinion nor to include within the definition of blasphemy a discussion in good faith upon controverted points. Malice is the essence of the crime, and only when the truths of Christianity itself are threatened will the courts interfere.<sup>4</sup>

The leading decision in American law upon the subject is by the eminent jurist Kent. Upon a conviction for malicious, wicked and blasphemous utterances calculated to reflect upon the divinity of Christ, that judge refused to disturb the verdict, holding that such words uttered with such disposition were at common law a crime. Reviewing the English cases upon the question, he affirms that wicked and malicious words, writings and actions that go to vilify the Christian gospels continue, as at common law, to be an offence against the public peace and safety, as affecting the vital interests of civil society, and tending to the corruption

<sup>1</sup> Taylor's Case, 1 Vent. 293: s. c. 3 Keb., 607; Rex v. Williams, How. St. Tr., Vol. 26, p. 656; People v. Ruggles, 8 John. (N. Y.), 289.

<sup>2</sup> Taylor's Case, *supra*.

<sup>3</sup> Blackstone's Commentaries, Vol. IV, p. 59; 1 East's Pleas of the Crown, 3; Tremaine's Entries, 225; Rex v. Taylor, 1 Vent., 293; 3 Keb., 607; Rex v. Waddington, 1 B. & C., 26; Rex v. Woolston, Raymond 162; 2 Strange, 834; Rex v. Hall, 1 Strange, 416; Rex v. Williams, How. St. Tr., Vol. 26, p. 656; Rex v. Carlile, 3 B. & Ald., 161; Cowan v. Milbourne, L. R., 2 Ex. 230.

<sup>4</sup> Rex v. Woolston, *supra*; People v. Ruggles, 8 John. (N. Y.), 289.

of the public morals and the destruction of government. There is nothing, said he, in our manners or institutions to prevent the application or the necessity of this part of the common law. We stand equally in need now as formerly of all that moral discipline and of those principles of virtue which help to bind society together. The general doctrines of Christianity are the faith of this State. To scandalize their author is a gross violation of decency and good order. Nothing is more offensive to the virtuous part of the community nor more injurious to the tender morals of the young than to declare such profanity lawful. No government has ever been so bold as to permit its religion to be insulted with impunity. No security to religious freedom forbids judicial cognizance of those offences against religion or morality which have no reference to any particular faith or creed, but are punishable because they strike at the root of moral obligations and weaken the security of social ties.<sup>1</sup> The decision in this case came up for discussion in the New York constitutional convention of 1821, and Judge Kent, who was there present, commented upon and explained the decision, saying that the court had never declared Christianity to be the legal religion of the State, for this would be to consider it an established religion, but only held that to revile the author of Christianity in a blasphemous manner and with malicious intent was indictable as an outrage on public decency and decorum, leading to a breach of the peace, not because Christianity was established by law, but because Christianity was in fact the religion of the people; and this was the principle of that decision.<sup>2</sup>

<sup>1</sup> *People v. Ruggles*, 8 John. (N. Y.), 289.

<sup>2</sup> *Debates in Convention, 1821*: pp. 374, 462, 463, 574-576. And see Wilson's *Lectures on Law*, Vol. III, p. 112; *Hale v. Everett*, 53, N. H., 1 (204); Cooley's *Constitutional Limitations*, p. 472; *Commonwealth v. Kneeland*, 20 Pick. 206 (235); *Uptegraff v. Commonwealth*, 11 S. & R. 394.

In determining the question of what is blasphemy and what is not, it is probable that our courts will allow a latitude much broader than the rule laid down by the English court of a century ago, granting free discussion upon controverted points that did not go to the truth of Christianity itself;<sup>3</sup> and indeed the abolition of all common law crimes by the codes of many States has removed this offence from the domain of judicial cognizance. In definition of the common law offense, however, the courts of Pennsylvania have held that one is free to argue in good faith against Christianity and its divine origin. To forbid free discussion would be to abridge freedom of speech and press. Blasphemy implies more than denial of any religious belief or principle. There must be a bad motive, a willful and malicious attempt to lessen our respect for deity or for the accepted religion. "No author or printer who honestly promulgates those opinions he believes to be true for the benefit of others is answerable as a criminal. Malicious and mischievous intent is the boundary between right and wrong. It is to be collected from the offensive levity, scurrility, and opprobrious language and from other circumstances whether the act be malicious."<sup>4</sup>

To sum up, therefore, this portion of our subject, we may conclude in the words of Judge Story that the divine origin and truth of Christianity are admitted by the common law and therefore it is not to be maliciously and openly reviled and blasphemed against to the annoyance of believers, or the injury of the public.<sup>5</sup> He who reviled, subverted or ridiculed Christianity could be punished at common law, because he struck at the root of society and disturbed the common peace of which the common law was the

<sup>3</sup> *Rex v. Woolston*, 2 Strange, 834.

<sup>4</sup> *Uptegraff v. Commonwealth*, 11 S. & R., 394.

<sup>5</sup> *Vidal v. Girard's Executors*, 2 How., 127 (198); citing *Uptegraff v. Commonwealth*, *supra*.

preserver. The common law took cognizance of offences against God only when by their inevitable effect they became offences against man and his temporal security.<sup>1</sup>

There are two other matters to which reference should be made in considering the relation of Christianity to the common law, for they at least illustrate the limitations of the doctrine. Lord Hale has said,<sup>2</sup> and he was followed by our own Kent,<sup>3</sup> that blasphemy was a crime, among other reasons, because one of its evil consequences was to impair the efficiency of an oath, being inconsistent with the reverence due to the latter, and tending to lessen in the public mind its religious sanction. This understanding of the common law can hardly be correct. The consensus of American opinion at least is that the sanction of an oath is the fear and invocation of some god, not necessarily the God of the Scriptures; that he, therefore, who believes in any god,—whether Christian or pagan,—to reward virtue and punish vice either here or hereafter, and to bind an oath upon the conscience of the witness by the penalty of his displeasure, is a competent witness, nor need that belief or anticipated punishment have any reference to a future life. Only he who believes not in any god can be bound by no religious tie and is at common law incompetent to testify in a court of justice.<sup>4</sup> Thus it appears that our doc-

trine of the binding force of an oath does not stand or fall by the presence of the teachings of Christianity as an essential part of the common law.

Secondly, it may be asked, do the statutes regulating Sabbath observance rest upon any tacit recognition of Christianity as the state religion, or imply the existence of an alliance between that faith and the body politic? Wherever this question has come before the courts for answer they have held uniformly in the negative. The laws imply nothing more than this, of which no law can lose sight but to its own detriment, that the religion of Christianity is in fact and indeed the faith of the land. The laws, therefore, which enforce abstinence from labor upon the Christian Sabbath have nothing to do with religion as such. They are merely calculated to protect the social customs of the people and preserve the public peace; they are mere civil regulations resting not on grounds of religion or morality, but on principles of policy, and made for the government of man as a member of society. The fact that that society is Christian in its faith and sympathies is important only as determining the form and spirit of those laws.<sup>5</sup>

These then are the limitations of the doctrine that Christianity is a part of the common law, and this the meaning of the maxim of Lord Chief Justice Hale in its true and only sense, that the common law would not permit the essential truths of revealed religion to be ridiculed and reviled, or in other and simpler terms, that blasphemy was at common law an indictable offence.

<sup>1</sup> Clayton, J., in *State v. Chandler*, 2 Harr. (Del.), 553.

But in spite of the *dictum* of the learned Story, it may well be doubted in the light of all the decisions whether the divine origin of Christianity has anything to do with the punishment of blasphemy, or whether the punishment is incapable of being otherwise justified. See Cooley's Constitutional Lim., 472.

<sup>2</sup> *Rex v. Taylor*, 1 Ventr., 293; 3 Keb., 607.

<sup>3</sup> *People v. Ruggles*, 8 Johns. (N. Y.), 289.

<sup>4</sup> *Arnold v. Arnold*, 13 Vt., 362; *Brock v. Milligan*, 10 Ohio, 121; *Omichund v. Barker*, Willes, 549; *Butts v. Swartwood*, 2 Cowen, 431; *People v. Matteson*, *ibid.*, note; *Hunscomb v. Hunscomb*, 15 Mass., 184; *Norton v. Ladd*, 4 N. Y., 444; *Scott v. Hooper*, 14 Vt., 535.

<sup>5</sup> *Linchmuller v. People*, 33 Barb., 548; *Neuendorf v. Duryea*, 69 N. Y., 557 (561); *Specht v. Commonwealth*, 8 Pa. St., 312 (325); *Johnson v. Commonwealth*, 22 Id., 102; *Commonwealth v. Nesbit*, 34 Id., 398; *Bloom v. Richard*, 2 Ohio St., 387; *McGatrick v. Wason*, 4 Id., 567.

## A PHILIPPINE DECISION.

THE novelty of the facts involved, as well as the conflicting opinions of the courts touching transactions similar to those in this case, lend interest to the following recent decision delivered by Hon. Arthur F. Odlin, Judge of the Court of First Instance, in the City of Manila:—

The plaintiff brings replevin for a pony, native gig (or *calesa*), and harness which he alleges are his property, and which the defendant wrongfully took from him. The evidence shows that the plaintiff in January, 1902, arranged for a raffle at which the holder of the ticket bearing the number last drawn should be the winner of the property. It is conceded that this raffle was illegal and void, being prohibited by an ordinance of the City of Manila enacted in December, 1901. The defendant held the number last drawn, and in good faith, supposing himself to be the winner, and therefore the owner, entered the *calesa* and proceeded to drive away. The plaintiff claims that he knew nothing of this action and gave no assent thereto. Just about the time that this was taking place (the evidence as to the exact moment is conflicting) it was discovered that one number held by the witness Irwin was outside the box and had never been drawn. Whereupon the defendant offered Irwin a half interest in the property, and the latter was and is very content. (Whether his contentment will increase or decrease when he reads this decision is a very pretty psychological problem.) Other holders of tickets considered this result irregular and requested a new drawing, and arrangements would have been completed by the plaintiff, according to his statement, had not the subject matter of the raffle disappeared.

I am satisfied that the defendant was

guilty of no fraudulent intent. There is no doubt that he believed himself the winner of the raffle. It is equally true that the plaintiff never gave any direct permission to the defendant to take away the property, and never made any formal delivery. The Court is therefore urged by the plaintiff to decide this case in his favor because he has proved title in himself and no delivery to the defendant, and because the alleged title in defendant is not such a title as the law recognizes. But the evidence shows that the plaintiff was not only guilty of participating in an illegal act, but also that he has received something like \$201 from the sale of raffle tickets, and the Court ought not to restore to him the property which enabled him to receive that money unless the law clearly entitles him thereto. The later decisions tend to establish the rule which I deem the correct one. . . .

Now must this Court decide whether this raffle was executed or is still executory? Supposing that the property had been deposited with a third party who had no knowledge whatever of the raffle and that the winner had drawn an order signed by the plaintiff on this third party for the delivery of the property and the plaintiff had sought to enjoin the presentation of such order: would such injunction be granted? Clearly not.

Another view of the case is this. The plaintiff admits that he would be estopped to claim the property had the raffle been "regular." Ought this Court to distinguish between "regular" and "irregular" raffles when all raffles are unlawful? A few illustrations will show to what extreme this doctrine would lead. I am of course well aware that since this ordinance took effect there

have been no progressive euchre games or poker parties in Manila. But it is thought that such pastimes were indulged in occasionally between January 1 and December 9, 1901. Let us suppose, however (purely as an illustration), that to-day, at a meeting of a Euchre Club, two Manila ladies, each having a score of eight, should cut for the prize fan, and the higher of the two should in good faith take the fan from the piano (while the hostess was temporarily absent from the room, ordering ice-cream and cake) and carry the same to her home. Immediately after her departure it should be discovered that a third lady, whose score had been erroneously counted as seven, had actually won eight games. Could a Court of Justice be called upon to restore this fan to the Club because the cutting had been irregular?

Again, let us assume (purely as an illustration) that in a poker game the Major should exhibit four sevens and, exultingly confident, gather in the reds, whites and blues (by the way, we now know why poker is called our "national game"), and while receiving the congratulations of the Colonel and the Lieutenant, the Captain should, for the first time, discover that his three eight spots absolutely destroyed his chance of winning, because, forsooth, there were only fifty-one cards in the deck, the missing card being the eight of clubs. Would a Court of Justice entertain a suit for the restoration to the Captain of such sum as he had invested?

I am unable to answer this question in the affirmative. Adopting the views of the distinguished Chief Justice of North Carolina

(115 N. C. 448), I believe public policy is best subserved by leaving both parties where their illegal conduct has placed them. In cases of this class, where both parties have violated the law, but are free from fraud, the true doctrine, as it seems to me, is that neither of them may be successful as a plaintiff. They will thus be taught that Courts of Justice will not aid them to carry into effect their unlawful games. It was suggested that in case the decision in this case were to be in favor of the plaintiff, the latter would carry into effect another raffle which he had already planned; and that this case should be decided in favor of the defendant in order to prevent another violation of the law. I do not, however, base my decision for the defendant upon that ground, nor do I decide that the title or possession of the defendant is valid. I merely hold that the plaintiff is estopped to claim this property. . . .

I think it my duty to call the attention of the Prosecuting Attorney of the City of Manila to the testimony in this case, which conclusively proves a violation by many distinguished American gentlemen of a plain, well-drafted city ordinance, but the nonchalance and frankness with which all the witnesses (except the plaintiff, whose attitude was that of a man who had been pushed into Court by his friends) admitted their guilt, was as refreshing to the ears of the Court as was the invigorating breeze from Manila Bay to the lungs of the Court during a stroll on the Luneta at the close of the trial.

Judgment for defendant. Plaintiff to pay the costs.



## THE POISON DRAMA AT THE COURT OF LOUIS XIV.

BY JOHN DE MORGAN.

IN the whole history of criminal trials nothing can be found to equal the horrors revealed in the courts of France during the reign of Louis XIV. In the secret history of every European nation there are chapters so strange, dealing with acts and characters so humanly incredible, that they can only be believed when supported by the most irrefragable evidence. The condemnation in 1676 of the Marchioness de Brinvilliers,<sup>1</sup> perhaps one of the most atrocious criminals that ever lived, led a bold and independent magistrate to investigate the acts of certain palmists and fortune tellers, who had obtained great power over some of the most conspicuous members of Parisian society.

Madame de Brinvilliers had not been dead very long before Gabriel de la Reynie, then Lieutenant of Police, ran to earth La Voisin and her confederates, little thinking that in so doing he was about to lead to the exposure of a series of crimes which were without parallel in the history of civilized society.

La Voisin, a pretty, petite woman, with bright blue eyes, with the countenance of an angel, was a fiend incarnate, for at her trial she confessed to having put to death over 2,380 children and to have connived at the murder of something like a hundred adults.

La Voisin arrived in Paris from the country at the very time when superstition had its strongest hold on the minds of the well-to-do people. She rented a house in the suburbs with a pretty garden, which she kept in perfect order, — she loved flowers and animals and birds, so simple and innocent was her nature, — and then set about, by means of well-prepared advertisements,

to attract the wealthy to her *séances*. She soon was in command of an income of twenty thousand dollars which she spent upon her lovers and friends, and in entertaining a peculiar and mixed *clientèle*, among whom was Guillaume, the public executioner who had recently decapitated the Marchioness de Brinvilliers, the famous architect Fauchet, the magician Le Sage, and the alchemist Blessis. At the back of her house she had erected a sort of chapel, beyond which was a furnace; it was in the chapel that the "Black Mass" was celebrated.

La Voisin delivered her oracular sayings clothed in a robe of sky-blue brocade, embroidered in silver, and a train of a deeper shade of blue velvet, edged with the richest lace. The cost of this robe was equal to fifteen thousand dollars. La Voisin's chief accomplice was the Abbé Guibourg, who is described by a contemporary as being "squint-eyed and old, with bloated face and prominent blue veins forming a network on his cheeks."

In the chapel at the rear of La Voisin's house he used to say mass, according to the proper rites, wearing the alb, stole and manipule, but on the altar a woman, generally nude, lay with arms outstretched, a taper in each hand, and on her body the mass was said. At the moment of the *offertoire* a child had its throat cut, Guibourg usually sticking a long, sharp needle into its neck. The blood of the expiring victim was poured into the chalice and mixed with the blood of bats and other materials obtained by filthy means. Flour was added to solidify the mess, which was then made to imitate the Host, to be consecrated at the moment when, in the sacrifice of the mass, transubstantiation takes place. "Black masses" were not the

<sup>1</sup> See "The Sainte Croix-de Brinvilliers Case," by H. Gerald Chapin; THE GREEN BAG, Vol. XIV, No. 5; May, 1902.

only sorceries whose rites required the sacrifice of children. La Voisin and her confederates perpetrated a terrible slaughter of them. Children deserted by unnatural mothers, others bought from poor women, did not suffice; several of the sorceresses

and did not return until she had been able to place her infant in a safe place of refuge.

The Marquise Françoise Athénaïs de Rochechouart de Mortimast, the second daughter of Gabriel de Rochechouart, Duke



LOUIS XIV.

were accused of killing their own children, and the Abbé Guibourg cut the throats of his two children by his mistress, Chanfrain. Children were stolen from nurses in the streets and never again heard of, and a fear took possession of young mothers that their children might be spirited away. La Voisin's own daughter fled from her mother's house on the eve of her accouchement,

de Mortimast, and Lord of Vivonne, and of his wife Diane de Granseigne, was born in 1641. She received a good education in a convent, and appeared in society first under the name of Mlle. de Tonnay-Charente, the name of the chateau where she was born.

In her early youth she was distinguished for her great piety, her rigorous fasts and abstinences and her devotion to the church.



Beautiful, witty, fascinating, she was chosen to be one of the ladies-in-waiting to the queen, and became the companion of Mlle. de la Vallière, who occupied the same position and was mistress of the king. Madame de Sévigné describes the advent of this

Devoured by ambition, and more than merely alive to her great charms, she set herself the well-defined object of becoming the king's only mistress, if not his wife. Imbued with a strong belief in the virtues of the "black art," she sought out La Voisin



MLLE. DE LA VALLIÈRE.

woman to the court as "thunderous and triumphant," and adds: "Her beauty is marvellous, and her get-up is as wonderful as her beauty, and her gaiety as her get-up." In January, 1663, she married the Marquis de Montespan and by him had a son. In 1668, when twenty-seven years of age, Louis openly acknowledged both her and Mlle. de la Vallière as his mistresses.

and became a regular attendant at the celebrations of the "Black Mass."

At her first celebration, her own body being the altar on which the sacrifice took place, she had prayed for "the affection of the king and the dauphin, that the queen might be barren, that the king might leave La Vallière and look no more upon her; and that the queen being repudiated, she

might espouse the king." This first "Black Mass" was celebrated in 1667. The following year a second mass was served, this time within the precincts of the royal court, and her prayer was that she obtain the favor of the king and to cause La Vallière's death.

It was proved at the criminal trial later that the masses were not effectual unless three were celebrated. The Abbé Guibourg sought his own safety and advantage and demanded the sum of one hundred dollars in cash and a large pension to be paid yearly as long as he lived.



MADAME DE MONTESPAN.

In that year she realized part of her ambition and became one of the monarch's mistresses; in the following year she bore him a child. There is no evidence that any child was sacrificed at either of these two masses, paid for by Montespan, but as the king's first flush of fondness for the beautiful woman cooled, Montespan sought out La Voisin again and arranged for three masses.

At the consecration Guibourg recited his incantation, the words of which he gave later to the Commissaries of the *Chambre Ardente* :

"Ashtaroth, Asmodeus, Princes of Affection, I conjure you to accept the sacrifice I present to you of this child for the things I ask of you, which are that the affections of the king and my lord the dauphin for me

may be continued; and that, honored by the princes and princesses of the court, nothing be denied me of all that I shall ask the king, as well for my relatives as my servitors."

Guibourg said that the child sacrificed at this mass was bought by him from "a very fine girl," to whom he paid a crown,—about three dollars of present value. Having drawn blood from the child, whom he stabbed in the throat with a small knife, he poured the blood into the chalice and then allowed the child to be taken away, doubtless to be burnt in the furnace at the rear of the chapel.

As Montespan became more popular than before and regained the king's favor to a larger degree, it can readily be understood that she believed the masses had been the direct cause of her success.

While the queen had a suite of eleven rooms at Versailles, Montespan had one of twenty-seven on the first floor. Her costumes were magnificent, her jewels were so resplendent that a lady of the court wrote: "Madame de Montespan was the other day covered with diamonds; the brilliance of so blazing a divinity was more than one could bear."

In the eight years that she was virtually the wife of Louis XIV. she bore him seven children, who were all legitimized as "Enfants de France." When she was for a short time neglected for the beautiful but unfortunate Madame de Fontanges, she was so irritated that she arranged with La Voisin for a deadly poison, which there is no doubt Montespan administered with her own hand. The infidelities of the king increasing, and Montespan fearing that she might be banished from his presence, turned her love into vindictive hate, and she offered La Voisin a sum equal to two hundred thousand dollars if she would poison the king.

The means she intended to employ seem

absurd to us in these days. M. Funck-Brentano thus describes them:

"In conformity with the ancient custom of the kings of France, Louis XIV. used to receive in person on certain days the petitions presented by his subjects. Everybody was introduced to his presence without distinction of rank or condition. It was resolved to prepare a petition and steep it in powders that had gone under the chalice; the king would take it in his hands and get his death-blow. La Trianon undertook the preparation of the paper, and La Voisin was to place it in the hands of the king.

"The petition was drawn up. The king's intervention was asked in favor of a certain Blessis, an alchemist whom the Marquis de Terms was keeping confined in his chateau. La Voisin betook herself to her friend Léger, a *valet de chambre* of Montausier, and asked of him a letter of recommendation to one of his friends at St. Germain, who would get her passed in among the first to an audience with the king, so that she might herself hand him the petition. Léger replied that it was unnecessary for her to go to St. Germain, as he would undertake to forward the petition by a sure route; but the sorceress insisted on presenting it herself.

"The boldness of La Voisin terrified the most courageous of her companions. The majority of them feared, not death, but the horrible tortures reserved by the law for regicides. In order to frighten her, La Trianon cast her horoscope. This document was found among the papers seized on the sorceress by the *Chambre Ardente*. La Trianon foretold that La Voisin would be implicated in a trial for a crime against the State. 'Bah,' she replied, 'there are a hundred thousand crowns to be gained.' That was the price agreed upon by La Voisin and Madame de Montespan for the poisoning of the king.

"La Voisin set out for St. Germain on Sunday, March 5, 1679, accompanied by Romani and Bertrand. She returned on Thursday, March 9, very much put out; she had been unable to approach the king so as to give him the petition. She could have

La Voisin was not able to make a second attempt, for La Reynie's patiently laid toils were gathering around her and her accomplices. Louis was in a quandary; he had permitted the investigation, had sanctioned legal action, but at that time he had no idea



MADAME DE MAINTENON

put it on the table placed near the king for that purpose, but the paper was useless unless it were placed in the king's own hands. She said that she would return to St. Germain, and when her husband asked her what the urgency was, she replied: 'I must accomplish my design or perish in the attempt!' 'What! perish!' he exclaimed, 'that's a good deal for a piece of paper.'

that his favorite mistress was involved. The revelations made by the daughter of La Voisin and Le Sage, who were arrested at the same time as La Voisin, were of such a nature that the king summoned Louvois to Versailles and confessed that for the sake of his crown the life of Montespan must be spared. "It would not do," his majesty said, "for Europe to know that I have

been the victim of such terrible proceedings." The trial of the murderers was conducted in secret, and Madame de Montespan was allowed to depart from Paris. She had not been away from the capital long before Louis sent for her and promised her royal protection, destroying with his own hands much of the evidence against her. He was careful to break off his attachment for her in truly royal and diplomatic manner, allowing her a pension of one million two hundred thousand dollars a year as long as she lived, together with all her personal belongings, furniture, china, pictures, and plate which she had amassed in her apartments at Paris and Versailles. The king then turned his back on her and she was not even allowed to attend the wedding of her daughter to the Duke de Chartres.

La Voisin was the only one of the murderous gang to suffer the death penalty. Guibourg and his horrible paramour, Chanfrain, escaped the torture and the stake to die in prison, and scores of innocent persons who were guilty only of having spoken with them in their preliminary confinement, so great was the king's dread of scandal, were condemned to a similar fate to ensure their silence regarding any chance information they might have learned. One of the gang,

a woman named La Guesdon, lingered in prison, chained to the wall of her cell, for thirty-six years, her companion, in the same cell, La Chappelain, another prisoner, survived for forty years.

Madame de Montespan survived the trial twenty-seven years and devoted her life to good works. She even humiliated herself so far as to visit Mlle. de la Vallière, who was in a convent and known as Sister Louise de la Misericorde, living a life of great austerity. Madame de Maintenon, who had been in the service of Montespan as governess of her son, and who had supplanted her in the affections of the king, took charge of the fallen favorite's children and did her duty by them, bringing them up as though they had been her own. Madame de Montespan died May 27, 1707, truly penitent, and respected by all who had known her in the last years of her life. Her sons were ennobled and the daughters made most brilliant alliances.

The trial of La Voisin brought out that besides Madame de Montespan one hundred and sixty-five of the leading people of France were accused of murderous malpractice, incantations, and sorceries. It was fortunate for them that the king's mistress was one of the accused.



THE VICTIM IN EVIDENCE.

BY HENRY BURNS GEER.

IT happened in old Kentucky, in the eastern, mountainous region, and the vital question was one of honor. The man had been shot. That was evident. Twice had the bullet plowed into his flesh, even as bullets have plowed into human flesh in "The Dark and Bloody Ground" ever since the days of Daniel Boone. One bullet had struck him in the right breast. That was fair—that was honorable. But the other—oh, shame!—had struck him in *the back*! His name was Ralph Norton, and his friends, to a man, were willing to swear that his assailant, Bud Hickman, who frankly acknowledged the shooting of Norton, had fired the second time after his victim had fallen,—hence the bullet in the back.

Norton was not badly hurt, and the matter would doubtless have been passed over without legal action, if the condition of the wounded man had not raised the question of honor. Had he received the first shot, and then turned to flee, thus receiving the second bullet in the back; or, had he fallen at the first shot, and then been wantonly and cowardly shot in the back, as he lay there defenseless?

The first shot produced a flesh wound of no serious extent, as the bullet had passed out and sped on its way; but the bullet in the back still lodged there. Still, Norton hesitated to taken action against Hickman over that which—minus the question of honor—both regarded as a trifling affair.

But it was the duty of the attorney for the Commonwealth to prosecute; and so it came about that Hickman was brought to trial, and Norton was brought into court. Nobody cared for the mere evidence of the shooting. That was a foregone matter, and

a fine, more or less heavy, against Hickman was expected. But, the question of honor—the more potent question—worried the friends of both men. They would gladly have formed a pool between them and paid Hickman's fine, if the other point should be adjusted satisfactorily.

A jury of men who claimed to know nothing of the affair, although it had been the talk of the county for a day or more, was soon empaneled, the evidence given in, and the case rested for the judge's charge to the jury.

This important duty, however, the court was in no hurry to discharge. His Honor knew too well the sentiments of the men before him to make a hasty talk to the honorable peers who sat there with hard-set, non-emotional features. With a sharp rap for order, and one sweeping glance about the room, his Honor said quietly:

"Is there a surgeon present?"

A small man, with thin gray hair rose up:  
"If it please the court, I am a surgeon."

His Honor's face brightened visibly:

"I would now ask the chief witness for the prosecution if, at this moment, he carries a bullet, lodged somewhere in his back?"

"Yes, Jedge," replied Norton, "thar's a ball thar, I kin feel hit."

The court then directed that the surgeon should be sworn in as an additional witness, and his evidence as an expert in human anatomy, the general course of bullets when fired from different positions, etc., should be taken. This was agreed to by both sides. Then, with another short, sharp rap for attention, the judge said:

"The Court directs that Mr. Norton and two friends, together with the surgeon, and

two friends of the defendant, Mr. Hickman, shall retire to the ante-room, that the surgeon may there make a careful and scientific examination of the wound in the back, that the question of the position of the body at the time the wound was inflicted may be definitely settled."

The instructions of the court were promptly complied with, the individuals named retiring as directed.

Their stay out was a brief one. The evidence of the surgeon was then given in :

"This bullet, your Honor"—holding it up between thumb and finger,— "was located, and easily extracted from its position, in the gentleman's back—a position which indicates beyond doubt that it was fired into his body while he lay on the ground face downward, where he had fallen from the force of the first shot fired by the defendant."

At this a fierce whisper ran about the court-room. Men with darkened brows

shifted from one foot to the other. The Court scented the storm in the air, and spoke briefly :

"Gentlemen of the jury, the case now rests with you."

The jurors filed slowly out of the court-room. In ten minutes they returned.

"Has the honorable jury arrived at a decision?" queried the Court.

"We have, your Honor," replied the spokesman. "It is the verdict of this jury, that the defendant, Bud Hickman, is guilty of malicious and cowardly shooting; and it is directed that he shall be immediately conducted by a court officer, sixty paces from the court-house door and there instructed to flee for his life,—and never to return to this county."

The question of honor was settled. Hickman was conducted to the brow of a hill, and the way beyond and down the far side pointed out. With eyes downcast he moved silently and swiftly on,—a disgraced man.

## CHINESE POLICE.

By ANDREW T. SIBBALD.

**I**N so large and rich a realm as China, among swarms of keen-witted and covetous folks, free from any restraints of religion to an extent unparalleled elsewhere, crimes must be common. There are no trustworthy returns on this head, or if there are, they have never yet come to the knowledge of the outer barbarians; but we may safely conclude that the Central Land is not more virtuous than her neighbors. The Pekin and provincial gazettes only tell, in fact, what the government wishes to become known. Making all allowance for exaggeration and oriental looseness of description, we may form a fair idea of the present condition of the criminal popu-

lation of the empire. Another source of information is afforded by the petty police tribunals of Canton, Shanghai, and other ports where Europeans trade. The amount of small theft is considerable, though scarcely so great as would be the case in a place of equal size on the shores of the Mediterranean, and instances of violence are remarkably few. Such seems to be the rule in China. The towns contain a due amount of tame cheats; but the bold, hectoring highwaymen, the truculent sea-robber, must be sought elsewhere. All along the Blue and Yellow rivers are found retail buccaneers, who hawk at a trifling quarry and fatten on slender prof-

its. These poor rogues do not aspire to a ship of their own; they come paddling out of muddy creeks in the smallest of sampans, ill-armed, ill-clad, but plentifully smeared with fish-oil. If manfully confronted, they fly; if grappled by the crews of the fourth-class junks, which they select as prizes, they slip like so many eels through the hands that grasp them, and their swimming makes amends for their lax courage. Seldom do any sinister results follow one of these attacks; if the fresh-water pirates prove victorious, they are mild conquerors, and only too eager to be on shore again with their booty of rice and corn, stray garments, odd fragments of chain, bits of copper and brass hastily ripped from the poop and cabins, and, perhaps, the glorious trophy of a few rattling strings of cash. The dollars and silver bars are generally too well hidden to be detected by such hurried searches; food, rather than fortune, is the object of the foray; and, except in rare cases of remarkable temptation, no life is attempted and no torture resorted to. With these amphibious petty-larceny rogues the magistrates deal mildly, according to the traditions of Chinese justice. Three hundred strokes of the bamboo may be endured by the human frame. Four sleepless weeks in the "cangue," or bamboo pillory, may fail to madden a stolid, unimaginative coolie. A few minor tortures need only be added to these two first-named inflictions, and the culprit is thought to have been most tenderly dealt with.

Pilferers in a fair, or the streets of a town, are considered as still more venial offenders. A vigorous bastinado, or a week of the pillory, is the law's award in such trivial cases. Petty assaults are as leniently disposed of, but fire-raising is a sin of deeper dye; and the malicious piercing of a neighbor's dyke, to let in a devastating flood, is punished with extreme vigor. Murder and treasonable practices, wholesale piracy and armed brigandage,

all cry aloud for death, more or less slow and painful; and parricide evokes the sternest chastisement of the Chinese, as it once did of the Roman law.

Forgery is less harshly viewed than with us. Orientals generally take a merciful view of those crimes which are wrought by pure cunning,—those æsthetic offences, as it were, which spill no blood, rifle no strong-box, and fire no roof. Accordingly, the talented imitator of commercial signatures is pretty certain to meet with judges who can appreciate literary merit, even when it stoops to counterfeit invoices and sham promissory notes. And Chinese law has a very extraordinary principle, radically opposed to our American ethics, which apportions light penalties to the high and erudite criminal, heavy and hard atonement for the misdeeds of the poor untaught sinner. Cathay has a peculiar tenderness for Dives, especially for a Dives who loves his library, and pens a sonnet in the true classical style of the Han dynasty. The purblind Astræa of Mongolian philosophy can afford to wink at the trespasses of powerful wrongdoers: they are beaten with few stripes; and that which in meaner men shall be esteemed heinous and horrible, shall in them be classed as a mere peccadillo that dollars can wash away.

But there are other offenders out of the pale of official sympathy, and these are the outlaws and the conspirators. The outlaws, or declared brigands, are in China a formidable fraternity. They are called, in the inland provinces, where the pure court language is the orthodox standard, by the name of *kouan-kouen*, or desperado. But on the borders of the empire, in Mantchuria, and on the edge of Mongolian Tartary, the Turkish words "orolis" and "haiduck" come into use—borrowed from the nomadic tribes of the Transoxian steppe. All these words, Chinese or Turkish, denote a daring



and avowed brigand, an open foe to law, a thing most hateful of all others to bureaucratic pedants like the formal mandarins. The kouan-kouen are not the most unpopular persons in the Central Land: they are admired by women, praised by men, sung of in the rude ballads of the peasantry, and when they mingle in the crowd of a village festival they are regarded pretty much as the mountain bandit is viewed by the rustics of Corsica and Sardinia. There have been Chinese Robin Hoods who have worn a pigtail and satin boots, and quaffed corn-brandy in the interval of their professional duties, no doubt, and the hardy marauders are not seldom liberal of their ill-got wealth, and scatter among the lowly what they wrest from the moneyed world. These free-handed depredators, the kouan-kouen, do not rely entirely on the popularity which their exploits and occasional gifts create for them among the indigent classes. They have confederates in the cities; their spies haunt the markets and hang about the inns; they have allies in the enemy's camp, and pay handsomely for intelligence. Here, a police brigadier gives timely warning of an expedition against the band: there, a sleek cashier notifies by writing that such and such bales, or so much ready money, the property of his employers, will traverse a certain road or canal on a particular day. The kouan-kouen are bold as well as wily; often it happens that they have been honest, well-meaning folk in their time, goaded into outlawry by some persecution on the part of the magistrates, or stripped of their patrimony by a lawsuit. Many of them can show the scars of torments wrongly inflicted by some capricious pedant; others have seen a son die in the cangue or under the lash for a light or imaginary fault; some have been members of a secret society; and detection has turned them into beasts of prey. Not every one can be a member of

these predatory clubs; they test their neophytes by a severe initiatory penance, by hunger and pain and fatigue. A tremendous oath of obedience and fidelity is enforced by the certainty of dire vengeance on the false brother; and the Chinese avow that the faith observed by these robbers towards each other is remarkably evinced, even under tortures the most elaborate.

To preserve the Emperor's peace throughout the realm, the principal agents are the policemen attached to the tribunals, small and great, who are known by their red robes, their high black caps, and the official pheasant-feather surmounting their heads like a horn. A mere magistrate will preside over a score of these picturesque alguazils, while the yamun of a prefect or a criminal inspector contains fifty or more armed constables, some of whom act as gaolers, and others as headsmen in case of need.

The villages never have a prison more imposing than a round house, where culprits may be locked up while an escort is preparing; but all walled towns have their penitentiary, where the wretched gaol-birds are crowded together like cattle in a pen, where the scowling governor economizes on the mere rations of rice, and where the horrors of Dante's *Inferno* are squeezed into pocket-compass. The Chinese of all ranks dread these prisons more than death itself. It is not that they are dens of misery, but that the confinement is irksome to poor Ching, who is used to travel, who is anything but the vegetable we deem him, and who has been in many a town and ranged many a league of land and water. Ching has wonderful powers of endurance; he can sing and chirrup quite blithely on short commons, can sleep in a corner, can be cooped up where elbow-room is scanty, food meagre, and oxygen scarce, and still keep his politeness untarnished and his heart gay.

There are more peddlers, more charlatans, more slippery adventurers in China than anywhere else. Hunger on compulsion, narrow lodgings on compulsion, a vile shed, a bare yard, frouzy rags, foul straw, the close companionship of lazars and ruffians, all upon compulsion, break down Ching's elastic spirit. Welcome death. And the mandarins are not unwilling to indulge the captive's preference for death over captivity. Long terms of incarceration do not suit the pocket of a country where so many must eat, and where so few are idle. When a prisoner does not avail himself of the right of appeal, he seldom languishes long. But before decapitating the kouan-kouen, it is necessary to catch them. The mandarins are not negligent on this score; they know how needful it is in so populous a country to enforce the law, and to suppress those who defy it. Besides this, they have a personal interest involved; for the outlaws cherish an especial grudge against the lettered aristocracy, and never let slip an opportunity of pillaging the property of a magistrate, of intercepting a tax-collector, or holding a captured mandarin to ransom. They cannot often strike a blow at their cautious foes, but he who molests one graduate disturbs the whole learned corporation, and must look to encounter the stings of the entire hive of alarmed pedants.

The pheasant-plumed constabulary are quite capable of controlling mobs and arresting the small fry of rascaldom, but they are mere mousing-owls, quite unfit to hawk at such noble game as the kouan-kouen. For this purpose, either a band of braves must be hired at the expense of the provincial treasury, or the regular forces of the government must be employed. The first plan is the most costly; the second is cheap, but entails an amount of correspondence and circumlocution worthy of the most civilized nations. A general in command of a district

must be memorialized, the War Office at Pe-kin requires to be consulted, the Imperial Chancery takes time for consideration, the Inspector of Crimes recapitulates, the Military Board rejoins, and the Viceroy and Prefect report progress. Many large and beautiful letters are painted with careful brushes and perfumed ink, many clerks have to transcribe and abridge, before the imperial brief authorizes the civil officials to command the services of the Crown troops. At length enough red tape is spun, and the web of destiny begins to close around the outlaws. A fourth-class mandarin usually commands the expedition. Although a civil magistrate, he goes forth armed and mounted; and under his orders are the two or more military mandarins who lead the soldiers, and who are also on horseback, with sword and bow and quiver, their men being on foot. Curiously enough, in spite of the superior valor of the Tartar division of the army, the mandarins are said to select Chinese troops for these duties of police, fearing, possibly, that the fiery Mantchu warriors might be overrash in advancing on the ignoble foe. Cavalry are seldom in request, owing to the nature of the ground. Of course, in a country so full of men and so bare of trees, places of concealment are rare. There are rugged mountain ranges, but these have occupants of their own, as in India, and it is seldom that robbers of the Chinese race own a hill-fort. When they do, they can generally afford to laugh at the mandarins, and unless the country people become their enemies, they cannot easily be starved or surprised. But most of the kouan-kouen have to take refuge among the huge swamps, natural fastnesses which abound in almost every province, where they erect their miniature stockade of bamboo, build wattled huts, and dig deep trenches around the little camp. Only the fowlers and fishermen ever penetrate these tangled

morasses, guarded by fever and fathomless quicksands; and these poor men, the kouan-kouen, stand well with the peasants, paying liberally for provisions, salt, gunpowder, and news. The magistrates would never venture a force among the quagmires without proper guidance. By threats and promises, by the exhibition of a little money and plenty of stick, they induce some of the fishers to pilot the column through the labyrinth of mud and waters; and an imposing aspect does that column present. First march a company of veterans, with long-barrelled gingals, matches lighted, and ammunition in plenty. The guides are with these matchlockmen, with their hands tied behind their backs, and a cord round each man's neck, as a delicate precautionary measure. Then comes the chief military mandarin, mounted, and armed like a Scythian. At his back come swordsmen and spearmen, all with shields and helmets, hideous with dragons and tigers of fancy colors, very fearful to behold. The subaltern officers follow, gallantly heading the archers and rocketmen, the former of whom advance with their short bows bent, and a barbed arrow fitted to the string. The civil mandarin rides next, sword in hand, followed by his own policemen, in pheasant-feathers and crimson serge; by a troop of impressed coolies, furnished with ropes, chains, fetters, and spare bamboos enough to secure a considerable amount of felons; and a band of music brings up the rear. But the gongs and flutes will not be wanted until the celebration of the victory; so the heroes advance without the beat of drum or noisy clamor, twirling their moustachios and vapping beneath their breath of the deeds they are about to perform. But when once fairly among the marshes, a change comes over these pigtailed Bobadils. They see spears through the rank grass and sedges; they huddle together like scared sheep at the

waving of the cane-break; when the wild fowl rise with clanging wing and harsh note, the sound suggests the war-cry of the kouan-kouen. The old adage is reversed, and it is the officer who takes every bush for a thief, and is pretty much of Lady Macduff's opinion as to the chance that the knaves may hang up the honest men. Sometimes the outlaws are surprised, and fall an easy prey; often they get safe off; now and then they repulse the attack. But if they fight and are beaten, strange scenes occur. Hours are said to be occupied in the contest between two or three hundred soldiers, and a score of highwaymen behind a bamboo stockade. The civil mandarin, with chattering teeth and dignity broken down, cowers beneath his horse, and squeaks at every shot like a wounded rabbit. The musicians throw away gong and cymbal, and run for their lives. The military mandarins rate and menace their men, urge them, drive them, abuse them, but never dream of leading them. It is not easy to get the poor privates to attack; they hang back, and duck at the shots of the enemy, and rattle their swords and shields, but decline to charge, while the matchlockmen lie down to take pot-shots at the brigands, and the rockets are let off pretty much at random. At length comes a crisis; the powder of the robbers is exhausted, or the hard words of the mandarins are a worse annoyance than hostile bullets, and a rush is made and a victory won. Not a bloodless victory; the kouan-kouen struggle hard, and sell their liberty dearly; but at last they are killed or taken.

We can fancy the triumph, the songs of victory, the barbaric dissonance of all these bellowing gongs, strident horns, sibilant flutes, blatant trumpets, ringing out the notes of victory! We can fancy the civil mandarin, once more on his horse, hectoring nobly over the fettered foe, shaking his scimitar in their

faces, and uttering leonine roars of martial wrath! Some series of pictures by native artists portray the glories of that homeward march; some of the prisoners in bamboo cages, others tied to poles, and loaded with irons; the robber chief, a man of great height and corpulence, with hands bound behind his back, dragged forwards by a tow-rope held by eight men, while as many more tug at a retaining cord in the rear, each puller having a naked sword in one hand; while the civil mandarin caracoled beside, and brandished his sabre over that detested head. Then the passage through the streets of the benighted city; the tramping, inquisitive crowd; the waving scarves; the blazing incense; the flowers strewing the way; the triumphal-arch, covered with lamps and ribbons; the fireworks crackling and spluttering; the gaudy lanterns flaring at every door upon the glad procession; and the ever-ready poet stepping up, smirking, to offer his neat ode, the ink of which is hardly dry. The immediate effect of so successful an enterprise is to put a considerable sum of silver into the purse of the civil mandarin, to gain for the captain and subalterns money or promotion, and for the soldiers a gratuity and double rations. Everybody is complimented, flattered, pelted with flowers, fed with sugar-plums, and enshrined in elegant verse and Gazette paragraphs. But the poor captives have the thorns for their share, not the roses. Beaten, cuffed, spit upon, assailed by every cowardly member of the mob, they are glad to find a resting-place in the gaol. Next day, or perhaps a day or two later, after the magistrates have come to an end of feasting and flattery, after his excellency the viceroy has sent off by an extra courier a flaming despatch to Peking — a despatch of which not only the contents, but also the paper, are *couleur de rose*, and when the populace have been regaled with fireworks, boat-races, and theatrical

shows, the trial comes on. There is evidence enough against the captives to consign them to the scaffold if they had a thousand lives apiece. But it is an object to find out who were their accomplices, what are the ramifications of their society, and so forth. Usually, too, there are individual crimes to be cleared up. There is a long and hard contest between the rival obstinacies of tormentors and culprits; days and nights are consumed in an interrogatory where the talk is all on one side, for the kouan-kouen die and suffer mutely, and take pride in their stubborn endurance. All that whips and sticks and brimstone matches can inflict, dangling on iron hooks, and swinging in mid-air by a piece of whip-cord artfully knotted around each thumb, semi-suffocation in smoke, dislocations, loppings of ears and toes, are tried in turn, but rare are the confessions to be wrung out of the sufferer's sullen resolution. The bandit usually "dies game," and betrays nobody. He is proud of his courage and fidelity; he has no hope of life, were he to be never so garrulous. He gives up the ghost and makes no sign, even to escape the cangue. This cangue is the main prop of Mongolian order — the stocks, pillory, and penitential-cell of Cathay. It is merely a cage of cross-bars, which are sometimes of bamboo, sometimes of iron, sometimes of heavy timber. The prisoner's body is enclosed in this cage, which reaches from his knees to his neck; his head and limbs are alone free, his hands being strapped to a bar. Now it is manifest that a criminal thus accoutred must be the prop and support of his own portable gaol; a captive Atlas, he carries about his own dungeon, and he cannot lie down to rest, but must pass whole days and nights on his feet, the poles attached to the cangue preventing him from lying down, while to the framework is fixed a placard inscribed with the wretch's name, offence, and

sentence. A cangue may weigh one hundred pounds, or only twenty, but in any case it is a dreadful punishment, kept on as it is for periods varying from six hours to six weeks. Imagine days and nights of cramp and sleeplessness, the harassing stings of mosquitoes and other tormenting insects worrying the naked skin, and no hand to brush them away; the scorching sun, and no screen; the chilly night, and no covering; weariness, dizzy brains, limbs racked by dire fatigue, fever, delirium, the pressure of the hard yoke on the galled shoulders, the strangling collar, the agony of long want of sleep, the thirst, the shame! They often go mad in the cangue, it is said; they fall asleep on their feet, like horses, from sheer exhaustion; they perish, and are found dead in their cages, like so many neglected wild animals in captivity. But the cangue is a favorite punishment among the judges.

There are other marauders in China who are less ceremoniously dealt with. All the larger mountain-ranges have an aboriginal population, quite alien in tongue, manners, aspect, and blood from the Chinese. The Lowas, on the Burmah frontier; the Tchang-Colas, in Quangsi province, are quite independent, and often troublesome. But the boldest and fiercest hill-men in China are the Mido-tse, who inhabit a huge chain of snow-capped heights that occupy nearly the centre of the empire, the Nan-ling mountains. These savage highlanders make regular descents upon the rich grain-producing plains and harass the three great roads which cross their difficult country. In spite of the foundling hospitals here and there attached to a convent of Bonzes, or a pagoda, infanticide is the great distinctive crime of China, as of all

Asia, from Lebanon to Corea. The esteem in which women are held, their social degradation, the lack of profit in female labor as compared to male, in a country where men do work of all kinds, combine to prompt cruel massacres of the innocents. But here the mandarin is meekness itself; the magistrate holds child-killing to be no murder, and exacts no death penalty for the crime, though mildly haranguing against it from the judgment-seat, and denouncing it in the Gazette. But the murder of an adult, especially of the male sex, is a serious matter. China is the native country of coroners; her officials shine in an inquest, and they have ancient and wonderful rules for detecting hidden homicide, and for apportioning the responsibility among those who were the foes of the deceased, those who touched the body without orders, and those on whose ground the mute witness was found.

The policemen, the actual constables, are divided into privates, corporals, and sergeants. They are sheltered in a magistrate's *yamun*, if bachelors; but if married, they often inhabit a hut within the compound of their superior's dwelling. They eat rice and melons at the charge of the province, and they receive a very small monthly payment, enough to buy tobacco and opium, should their chief not embezzle it on the road. But for this the pheasant-plumed care little; their dependence is on bribery, and where denunciation may cause ruin, and must cause annoyance, no mouchard need despair of a comfortable living. Curiously enough, the police extort less from the rich than from the poor. To crush a wealthy man is not such an easy task as in Mussulman countries, and justice grows gentle as she mounts the social ladder.

LYNCH LAW IN CALIFORNIA.<sup>1</sup>

ONE of the first instances of the application of lynch law in California was in proceedings taken in January, 1849, from which Hangtown, now Placerville, derived the former name. The facts appear to be about as follows: five men had been caught in the act of attempted robbery and larceny. The feeling of the miners ran high, as it generally did in cases of robbery, larceny and murder. No court, it seems, was organized in the town, hence, a provisional judge and jury were called to try the case. The proceedings were conducted in an orderly manner, and the sentences rendered that the prisoners should be given thirty-nine lashes each. Hardly had the sentence been executed, before other charges were presented against three of the men for robbery, and attempt to murder, committed on the Stanislaus River in the previous autumn. A jury of all the miners in camp, about two hundred in number, heard the evidence, and sentenced the unhappy prisoners to be hanged. Only one man seems to have protested against the sentence, but his protests were quieted under threats of death. The defendants suffered the penalty thus imposed upon them. . . . Although it may be said the punishment devised for the offenders was swift and merciless, yet even here is presented the beginnings of order; the regard for law is illustrated in the adherence, imperfect and prejudiced though it was, to those forms and methods of procedure with which the citizens were already acquainted.

Ford's Bar, on the middle fork of the American River, had, as early as May, 1849, acquired the reputation of being the worst place on the river. In the month indicated a drunken row between two of the miners occurred at this place. One of the com-

batants was struck so violently with a crow-bar that he fell into the stream. The other followed, and the two infuriated men fought in the water. The fight almost resulted in a general combat between the friends of both parties. Better judgment prevailed, and after calm was restored, seeing that recurrences of such disgraceful scenes should be prevented, the men called a meeting and voluntarily agreed upon a few simple rules calculated to secure the peace and quiet of the camp. The code of laws thus improvised provided for the trial of certain specified offences by a jury consisting of three persons. It is amusing to read the first application of the law, thus devised, to the case of a tinker who had been arrested for assaulting a party with a junk bottle. His antagonist retaliated by drawing a knife, and with it inflicting several severe cuts and gashes upon the tinker. Both men were arrested and taken before Alcalde Graham, who evidently was the leading spirit in the administration of justice in the camp. The tinker, although the offending party, was acquitted, "because there was no law against using a bottle as a weapon," while his antagonist was convicted of unlawfully drawing a knife, an offence which had been expressly legislated upon in their simple code of laws. This incident illustrates in an amusing way the layman's view of the established principle of the common law, that criminal statutes must be strictly construed. It may be well imagined that the decision of the alcalde met with much disfavor in the camp, for ordinarily such refinements were given scant approval.

The feverish haste exhibited at lynch law proceedings may be illustrated by a case which occurred in Columbitt, Tuolumne County, on Wednesday, October 10th, 1855. A man named John H. Smith became involved in a quarrel with the proprietress of a

<sup>1</sup> Extract from an article by John G. Jury, in "History of the Bench and Bar of California," edited by Oscar T. Shuck, Los Angeles, California: The Commercial Printing Company.

saloon, during which quarrel he was fatally shot by the husband of the woman, who, on coming from an adjoining room into the bar-room where the quarrel was going on, fired upon and killed Smith. John S. Barclay was the name of the murderer. The direction given to the trial, and other events which followed, was determined principally by the attitude of James W. Coffroth, a popular man in the camps, who had just been elected to the State senate. Coffroth, in his regard for his deceased friend, allowed his passions to dominate. He vehemently demanded that vengeance he meted out to Barclay for the crime. The mob was stirred to frenzy by Coffroth. No thought, however, was entertained of visiting punishment upon the offender without a show at least of fairness. The crowd gathered about the jail, and a judge, marshal, and jury of twelve persons were impressed into service. The iron doors were then forced open, and Barclay, who had hoped to make his escape through the crowd, was seized and carried off by the excited people, amid cries and imprecations. In the impromptu trial, Coffroth acted as the prosecuting attorney, and John Oxley, a man of firm and noble purposes, defended the prisoner. Coffroth was insistent upon revenge, and in his shrewd way invoked in behalf of the people the law, "An eye for an eye; a tooth for a tooth; a life for a life." The text, "Whoso sheddeth man's blood, by man shall his blood be shed," was also used to lend strength and the semblance of sanctity to his case. Despite the protests of Oxley and his appeals to the people, asking them to reflect on what they were about to do, amid cries for the life of the prisoner, Barclay was told to prepare himself for the execution which awaited him according to the sentence. The sheriff of the county, J. M. Stewart, made an ineffectual attempt to rescue the prisoner, but was beaten back and hustled away from the scene. While the sheriff was being thus fought off, the prisoner was hanged. His arms were left un-

pinioned. His convulsive clutching at the rope, while hanging in mid-air was greeted with derisive cries and yells from those who looked on. This, in brief, is the story of one of the most barbarous cases in the annals of lynch law.

Another extreme case was that of the lynching of a woman for the crime of murder committed on July 5, 1851, at Downieville. The story of this revolting case is told by Mr. Hittell in his excellent *History of California* (Vol. 3, page 307), as follows:

"It was one of the sequels of a great Fourth of July celebration. John B. Weller, afterwards Governor of the State, had been announced to deliver an address, and a very large crowd congregated to hear him—the miners and settlers coming in from all the camps in the neighborhood. After the regular exercises of the day, there was much drinking and carousing; and in the evening, when it began to grow dark, a number of the revelers started out staggering through the streets, hooting and howling, beating on houses and breaking open doors here and there as they went. Among other places attacked was a house occupied by a Mexican woman, called Juanita, and a countryman of hers, who kept a monté table. One of the revelers, and perhaps the most hilarious of them, was a Scotchman of large size and great physical strength, known as Jack Cannon. He seems to have been acquainted with the woman, or at any rate, went to make her a visit the next morning. Some said his object was to apologize and pay for any damage he had done; but this does not appear to be probable. Whatever his object may have been, he was seen to go up to the door, where the woman and her Mexican friend were standing, and was heard to address her with a vulgar expression. She immediately turned back into the house and entered a side room, leaving Cannon leaning with a hand on each side of the doorway, conversing with the man. In a moment afterwards, however, she came back, holding

one hand behind her, and rushing forward, she plunged a long knife, with all her strength, into Cannon's breast and killed him.

"The news of the homicide spread like wild-fire. It took but a little time for an immense crowd to collect. They were not fully over the effects of their dissipation of the day before; but their excitement took a new direction; and it was now for vengeance on the murderer of Jack Cannon, who had been a jolly good fellow, and popular with everybody. On the first indication of this feeling, the woman had left her own house, and entered the saloon of one Craycroft for protection. But the crowd soon surrounded Craycroft's, and, seizing the woman, carried her to the main plaza of the town, where the stand erected for the exercises of the day previous still remained. Her Mexican friend continued with her, while the body of Cannon was exposed in a tent near by. Upon arriving at the plaza, the first things done by the crowd were to select a judge and jury and appoint counsel for the people and the defendant respectively. There was little for the prosecution to do; but the attorney for the defense received very bad treatment. Seeing that he could say nothing of importance in reference to the killing, he confined himself to the enormity of hanging a woman, and put that enormity in so strong a light that the mob became maddened and kicked the barrel on which he stood, from under him—his hat going one way and his spectacles another, while he himself was carried at least a hundred yards, hustled from side to side, before he touched the ground. Next a doctor, named C. D. Aiken, attempted to save the woman by claiming that she was about to become a mother; but, as is usual on such occasions, other doctors were found to express a directly contrary opinion; and the result was that Dr. Aiken was ordered to leave Downieville, and found it safest to do so. The infuriated crowd would evidently suffer nothing to be said or done in favor

of their victim, and would brook no opposition to their predetermination to be avenged. The end was not long coming. The jury, in a very short time, returned a verdict of guilty; and the judge, without waiting to be prompted by the crowd, sentenced the woman to be hanged. She was given only an hour to prepare for death, while arrangements were made on what was known as Jersey bridge for her execution. A rope was fastened on one of the projecting upper timbers, while beneath it a plank, six inches wide, was pushed out over the stream, and lashed to the floor timbers of the bridge. At the end of the hour the woman was brought to the place, and stationed on the plank. There were several thousand spectators present. The woman, of course, knew what was coming; but she appears to have been perfectly cool and collected. She surveyed the crowd, and spoke pleasantly to several of her acquaintances. She took off her hat and handed it to one of them, bidding him good-bye in Spanish. She then took in her own hands the rope that was being thrown over her neck, and adjusted it beneath her black hair. A white handkerchief was fastened over her face; her hands were tied behind her; and at each side of the plank behind her a man, ax in hand, stood ready to cut the lashings. At the report of a pistol, which had been agreed upon as a signal, down came the axes; the plank dropped, and Juanita fell three or four feet, and remained suspended. Consciousness was apparently extinguished instantaneously upon the fall; and death was rapid."

Perhaps the best organized and least objectionable form of lynch law was that exhibited by the Committee of Vigilance of San Francisco, organized June 9, 1851, and re-organized May 14, 1856. There had been vigilance committees in other towns in the State, yet that which was formed in San Francisco on the dates given above undoubtedly deserves the reputation of being the best conducted and most strikingly im-



pressive organization of the people for dealing with crime, outside of the regular courts of justice, that has ever been established in any age or place. It has been said of a vigilance committee that it will itself break the law, but it does not allow others to do so. The doctrine of vigilance, as of lynch law in general, is based upon the theory that the people have the right to hold perpetual vigil over all their institutions and to correct, where necessary, abuses and corruption which threaten the security of their lives and property. It is civil revolution as opposed to civil rebellion. This right, if such it be, may be exercised, it is claimed, in the extremity of necessity arising out of the prevalence of crime and the immunity of law-breakers from punishment. Vigilance proceeds upon the principle that if the law is notoriously inadequate to reach and efficiently punish law-breakers, it would be a greater crime and wrong upon the public to permit such lawlessness and corruption, than to supersede the recognized authorities by a new organization which shall deal more effectively with such evils, than the courts through venality, or some other weakness, are able to do.

The stern judgments reached by the Vigilance Committees in San Francisco, were characterized by unselfishness, and above all, by an unquestionable solicitude for the public welfare. Yet even this organization, made up for the most part of good citizens, could not find more than passing favor

among the citizens of the State. Only the greatest necessities evolved from the conditions of the times, could warrant the creation or existence of a tribunal of men whose work was so revolutionary in its purposes and results.

The double execution of James P. Casey and Charles Cora on May 22, 1856, and that of James Hetherington and Philander Brace on July 29, in the same year, were most spectacular exhibitions of the method in which the Vigilance Committee of San Francisco dealt with the city's criminals. These men were tried by the Vigilance Committee for heinous offenses, convicted and sentenced to be hanged. The terrible earnestness of the committee, and the expedition shown by it in dealing with these representatives of the most depraved and desperate class that have ever infested any city in America, gave rise to almost revolutionary conditions. Though bitterly opposed by the regularly constituted State and city authorities, the Vigilance Committees of San Francisco were instrumental in putting a stop to street murders, lawlessness at elections, and in effectually lessening corruption in the courts. These results in San Francisco, and similar results reached elsewhere throughout the State, stand as the sole justification for the existence of organizations based necessarily upon the doctrine that the safer and less violent methods afforded by courts of justice must, when notoriously inefficient, be either undermined or entirely superseded by force.

### LONDON LEGAL LETTER.

MAY, 1902.

AN increasing interest is being manifested in criminal procedure and its results, both in this country and in France. In certain respects the English practice leaves very little to be desired. The law is simple

and is well administered. The judges of the King's Bench Division of the High Court take, in turn, the work of the Central Criminal Court, at the Old Bailey. On circuit, the assizes are held by two judges, one

of whom takes the criminal and the other the civil work, as they may arrange between them. Counsel who are actively engaged in civil practice find nothing derogatory to their dignity in criminal work. It is true that there are a few lawyers whose occupation is mainly in the criminal courts, but that is only because they have had exceptional experience in that branch of the law.

They have the same standard of culture, the same high character, and the same learning as those whose work is exclusively civil. The trials are conducted with dignity, and in such a manner as to impress the prisoners and the witnesses. Usually the interval from the date of arrest to the date of sentence is not more than six weeks. There is no appeal except in a very limited class of cases, and consequently no objection to evidence at the trial, and no tedious bill of exceptions, and there are therefore no reversals and no long delays pending retrials and fresh appeals. There is no exception made in this rule in murder cases, the convicted prisoner being usually executed in less than two months from the date of his committal for trial by the examining magistrate. Such a thing as a "murderer's row" is unknown in an English jail, and the celerity of the procedure gives no time for maudlin sympathy. The only matter about which there is controversy is the nature of the punishment. The law in every case provides a maximum, and in some cases a minimum, sentence. This enables certain magistrates who advocate leniency to impose a nominal sentence for an offence which a magistrate in a neighboring jurisdiction will punish with a considerable term of imprisonment. No matter upon what theory as to the object of punishment the judges act,—whether they may consider it as retribution, or as expiation, or as an example to others, or for the purpose of reforming the offender,—there is a con-

sensus of opinion that there should be some attempt at uniformity in the term and nature of sentences for the same offences.

Recently this matter has been discussed by the Society of Comparative Legislation in England, and by the International Congress of Comparative Law. At the session of the latter body, held in Paris in 1900, a commission was appointed to investigate the principles which should guide the judiciary when pronouncing a criminal sentence.

Mr. Montague Crackenthorpe, who is the author of the movement, has recently retired from a very large special practice at the English Chancery Bar. He will be pleasantly remembered in the United States as one of the suite of distinguished lawyers who accompanied the late Lord Chief Justice, Lord Russell, of Killowen, to America in 1896. He read, upon the occasion of that visit, a paper before the American Bar Association on the "Uses of Legal History." Mr. Crackenthorpe's commission has recently decided to make as wide an inquiry as possible upon the questions which were referred to it by the International Congress, and for this purpose has issued a circular letter to prominent lawyers in various countries. This letter sums up the nature of the information required in the following terms:

Three distinct theories of punishment—the expiatory, the deterrent, and the reformatory—have, as is well known, been discussed for a long time by philosophers and criminologists. Each, or all of these combined, may be adopted by the judiciary. Thus, one judge may hold the main object of punishment to be that the offender should do penance for his sin; another that he should be made a public example of; a third that he should be reformed by the discipline of the jail, and only be imprisoned for life or for a long period of years if reformation appears to be hopeless.

Again, whatever theory of punishment a judge may most incline to, he may have to subordinate it to special circumstances. For example, the frequency of an offence in a particular district, or the fact that it is more dangerous there than elsewhere, may require him to give the first place to the deterrent theory, although, apart from such special circumstances, he would be disposed to assign to that theory the last place, or possibly ignore it altogether.

Lastly, it may well be that a judge may make a distinction between individual offenders whose offences, when considered objectively, are the same. He may, for instance, attach importance (*a*) to previous convictions, even when these do not form a statutory ground for augmenting the sentence; (*b*) to the moral character of the offender apart from his judicial record; (*c*) to the degree of the offender's intelligence and education; (*d*) to the difficulties he has had to encounter in the past; (*e*) to the extraordinary temptations by which he was surrounded at the time of the commission of his offence. These distinctions may be further varied, according as the offender is a man in the prime of life, a man far advanced in years, a woman, or a child.

Bearing in mind these considerations, the commission, whilst welcoming any general observations, requests brief answers to all or any of the following questions:—

QUESTION 1. Does the judge, in fact, when awarding a sentence, act on any theory as to the object of punishment, such as retribution, expiation, reformation of the offender, or the like? Is it desirable that he should do so?

QUESTION 2. Does the judge, in fact, keep the same end in view in the case of all offences, or does he make a distinction between one offence and another? Is it desirable that he should do so?

QUESTION 3. When he makes a distinction between one offence and another, on what is the distinction based? On the character of the punishable act looked at from a moral standpoint? On the greater or less frequency of the crime in the district? On the greater or less risk to which it exposes the community, or on any and what other circumstances?

QUESTION 4. When he makes a distinction between one individual and another, does the distinction turn on the offender's antecedents as shown by his judicial record, or on his degree of intelligence and education, or on any other, and what circumstance? Is the age or sex of the offender taken into account, and, if so, to what extent? Is it desirable that any, and which of the distinctions above mentioned, should be made?

QUESTION 5. In the absence of special circumstances, does the judge award the full penalty allowed by the law, or does his normal sentence fall short of this?

The idea of the commission is to secure replies, so far as possible, from those who have had wide experience in the administration of the law, and from those who have given special study to this class of subjects in connection with criminal matters. Already several eminent American lawyers have been appealed to, and their replies will be incorporated in the report of the commission.

STUFF GOWN.



# The Green Bag.

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor,  
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

*The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.*

A RECENT number of *The Scots Law Times*, bewailing the "jest judicial," speaks of a certain Scottish court as a "jest-factory," and enunciates the *dictum* that "a pun is the feeblest form of wit, and a judge's forensic jest is, generally speaking, the next in feebleness, while it is an easy first in fatuity." Far be it from us to defend the "jest judicial" as sometimes "she is spoke"; the American lawyer is not without troubles of his own on that score. Yet one of the most lasting things in the law is its humor; the legal joke is coeval with the law. Even the law-student jests; as witness *The Brief*, the work of certain students in the Harvard Law School. We commend this clever bit of legal jesting to the attention of those of our profession — and they are many — in whom "the law's grave study" has not killed the sense of humor. And as this ephemeral publication — whose first number may be its last — is already out of print, we feel in duty bound to quote the following selections from its learned pages, premising only that the title-page bears the warning that *The Brief* is "copied wrong," with "all rights reversed."

## SOME INSULAR QUESTIONS.

The recent unprecedented territorial expansion of the United States has given rise to questions so obvious that the necessity for our here discussing them may not at first sight appear to one unfamiliar with the complex organization of our judicial hierarchy (or the reverse, according to the view taken by the learned judge in the case of *Smelovisky v. Onomatopoeia*,<sup>1</sup> recently decided by a divided court before the Players' Bench on an appeal from the Referee's decision); but of this more anon.

<sup>1</sup> 2 Harrigan & Hart, 47.

And the confusion<sup>2</sup> of the law on this point has made it imperative if not advisable. *Ut dormientes canibus mendaciunt*<sup>3</sup> (let sleeping dogs lie). Now, to turn to the burning question of the water cure.<sup>4</sup>

Lord Ellenborough, in discussing this, said: "The defendant, as we understand the procedure under the Code, was first filled with water,<sup>5</sup> and then pressed upon the stomach *vi et armis* (usually a musket). The burden thus having been cast upon the defendant, was equitably distributed by the Revised Laws of Hydrostatics. . . . The presence of minnows in the water used is absolutely irrelevant, for *de minimis non curat lex*. Further than this we do not care to go."

But it is submitted (a) that water is not an intoxicant<sup>6</sup>; (b) that this was a case for maritime law anyway<sup>7</sup>; (IV) that he was nothing Moro less than a Filipino; (h) that Curfew shall not ring to-night. And so the law stands today. For in the whole mass of conflicting judicial testimony we have not been able to find a single case of even doubtful autopsy,<sup>8</sup> nay not even a *dictum* or a hot dogma, where such has been the case.

*Per contra*, with the possible exception of some badly considered but extremely able decisions of the Supreme Court of the United States, the Vice-Chancellor of Oklahoma is unanimous in deciding that whatever may be the result, the answer can go but one way.

To sum up: Nothing has been urged in favor of this view which cannot, with equal propriety, be urged against it, or left un urged, or urged *bis*

<sup>2</sup> A word has been omitted here.

<sup>3</sup> *Maxims of Hafiz*, p. 48.

<sup>4</sup> The reference to the water ordeal may be found in the Pipe Rolls, whatever they are.

<sup>5</sup> Cf. *Governor of North Carolina v. Governor of South Carolina*.

<sup>6</sup> *Quare* why not. — Ed.

<sup>7</sup> J. Wirth on Schooners 29.

<sup>8</sup> You mean authenticity and then you're wrong. — Ed.

*et idem*, unless it be clearly *ultra vires*. And here<sup>1</sup> we are content to leave the matter.<sup>2</sup>

#### THE PERSONNEL OF THE SIAMESE BENCH OF SUPREME JUDICATURE.

The Chief Justice of the Supreme Bench is a red-headed pirate who always went armed to the teeth until he lost them. He is now armed to the gums. He wears red mittens gummed to his arms. His decisions have never been questioned. He has never made any.

The other eight justices are three persons named Killyloo. The first is leonine but inadequate. His diction is delphic but ambiguous, at times even amphibious. He is also ambidextrous, being unable to write with either hand.

His younger brother, Jimmy, weighs twenty pounds less, which detracts from the weight of his decisions. He is a brilliant example of what is known as judicial levity.

The other three members of the bench are twins, each of the two older being twins with the youngest, on the principal that twins that are twins to the same twin are twins to each other or anything else.

#### CONTRACTS AND CRAZY CONTRACTS.

1. Pedro, a push-cart peddler, made an oral contract for the purchase of a banana with Florida Fearne. Owing to a cessation of revolutions in South America fruit rose rapidly in price. After doing half the work Parsons stopped because he obtained a more advantageous contract with John, the Orangeman. Shortly afterwards Dart died, neither he nor Adams having discovered the mistake. When Sixto Lopez learns the facts, can the Bank recover on a *quantum meruit*?

2. A statute provides that a bushel of coal shall mean forty miles. Dane, a coal-stealer under a charter party, took dower in a cargo belonging to East. The coal decayed rapidly owing to act of neither party. Thus it happened that Parsons paid one and one-half times as much as an accurate measurement would have required.

Under this state of facts, what is Fearne's common-law liability to Parsons or to Tidd or to East or to anyone else you can think of?

<sup>1</sup> *Supra*, p. 000, l. o.

<sup>2</sup> If you want more, go back (a) and begin again. — Ed.

(a) I The Brief 1.

Would it have made any difference if Dane had been a sutler? a cutler? a butler? a *dan-seuse*?

3. Rewrite everything you have written, leaving out the mistakes.

4. If I paint my neighbor's house a disagreeable color, under the impression that I have no right so to do, and he licks the paint off and dies, can I recover anything from the heirs on a *quantum valebant*? Could I if he knew it was paint? if he knew it was paint, but thought it was green? or neither? or both?

5. } Rearrange the facts in the foregoing ques-  
6. } tions in any way you please so long as you  
7. } don't know the answers, and then answer  
8. } them the same as before.  
9. }

10. You won't have time for this anyway.

#### RECENT CASES.

AGENCY — POWER COUPLED WITH AN INTEREST — REVOCATION. — An intestate wishing to probate his will deputed one to do so for him. He then died and afterwards ratified the agency. *Hell*!<sup>3</sup> The pardon came too late. *Rameses v. Anargyros*, 6 Hg. 41. This case goes none too far. It is obvious that a fraudulent moribund cannot claim the benefit of his non competency *mentis*. An act cannot be at once retroactive and perspective.

CONTRACTS — IMPLIED CONDITION SUBSEQUENT — PUBLIC POLICY. — Plaintiff sued on an insurance contract never made. One of the conditions was that unpaid premiums should lapse. Several had in fact lapsed when defendant company died. *Hello*,<sup>4</sup> that the condition not having been complied with, it was up to the jury to construe the contract in accordance<sup>5</sup> with its terms. *Gaston v. Alphonse*, 2 Sunday Law Journal 999½.

The essence of the contract is the meeting of minds. If they meet from opposite directions a head-on collision will result. If differently, otherwise. Which accounts for the tooth on the walrus.

TORTS — TRESPASS IN EXCELSIS — JUSTIFIABLE FORCE. — A man in a balloon, having money to throw to the birds, proceeded to do so.

<sup>3</sup> Misprint. — Ed.

<sup>4</sup> See note 3 *supra*. — Eddy.

<sup>5</sup> See note 4 *supra*. — Edward.

A man shooting from below hit a golden eagle belonging to the United States Government and mutilated it. The aeronaut was thus prevented from sailing around the Eiffel Tower and winning a prize of 10,000 francs. With this sum he would have made a million dollars (perhaps) in the Chicago Wheat Pit. He sued the gun-maker for statutory replevin. *Held*,<sup>1</sup> that the gun-maker was not liable on the ground of *de gustibus nil nisi bonum*. *Mee v. Hym*, 14 Bucket 1.

In accord *Ex parte* Cake VI Birthday Book Hen. IX. c. 33. A man's right in his land extends *usque ad cælum*. Further than this we do not care to go.

OUR EXCHANGES.

COKE. — Of what act is a bad shot in England guilty?

LITTLETON. — Miss-pheasants.

—6 *Harv. Law Rev.* 90004.

LORD MANSFIELD. — For a well-balanced man, Loughborough seems to smell out an awful lot of trouble.

MARSHALL, C. J. — That's due to his scenter of gravity.

— *Cro. Eliz.* 91.

PERJURY. — Anything done by a jury.

—70 *Yale L. J.* 1.

QUÆRE. — Is a parrot that calls you vile names a personal chattel?

—3 *Blackstone's Com.* 41144.

THE best beast of a college shall not be taken for a haricot vert.

— *Pothier, Civ. Law* III.

THE C. J. — Why doesn't the Dean of the Columbia Law School teach Evidence?

THE P. J. — Because he's Keener on Quasi-Contracts.

— *Y. B. III Hen. I.* 2.

QUÆRE. — Has summer-y procedure anything to do with seisin?

—o *The Green Bag* 00.

WE are accustomed to look in the pages of the poet and essayist, rather than in the volumes of law reports, for one mark of literary genius — the choice of exactly the right word to express the most delicate shade of meaning. Yet

<sup>1</sup> See note 2 *supra*.

*Taylor v. Hair*, 112 Fed. Rep. 913, contains a phrase so fortunate that we cannot forbear to call it to the attention of all lovers of exact expression. This was a suit on a benefit certificate issued in favor of the fair plaintiff, who based her claim on a promise to marry made between herself and the deceased Hair some four months before the plaintiff had obtained a divorce from her husband and within six months after the divorce of Hair from *his* wife, during which period he could not marry. What could be finer than to declare, as the Report here has it, that the lady bore to the late lamented Hair the relation of *financée*? This is nothing short of a stroke of genius.

NOTES.

"DIVORCE is not the easy matter it used to be," remarked the groom-elect casually. "States where only a brief residence used to be required now demand that the complainant shall have resided in the State a year."

"George, dear," said the Chicago widow persuasively, "when we take our wedding trip let us go right to one of those States for our honeymoon so all that time will not be lost travelling around the East."

IN one of the far western jurisdictions, in an appellate court, there was filed recently by the chief law officer of that subdivision of our country, a brief from which is taken the following entertaining extract (it is perhaps well to have in mind the fact that the author of the brief, and several members of the court, are bald-headed): "A large amount of expert testimony was taken to show the vagrant, not to say dissolute, habits of the infant bovine of the male sex, from which it is sought to be shown that, at the tender age of six months, a red bull calf will forsake his mother in an erotic chase after stray cows, and that, regardless of hunger or filial duty, this youthful Lothario of the Guadalupe plains will travel for miles on an empty stomach to gratify what must be at best a hopeless passion, and, with futile dalliance to take the place of mother's milk, grows emaciated and 'choused.' But it must be remembered that this particular bull calf, whose character is assailed in a general manner, was 'bald-faced,' and this Court will take judicial notice of the fact that baldness,

whether of the face or head, is always an outward and visible sign of inward virtue, and whatever may have been the state of morals of concupiscent calves of his sex and size in Guadalupe county, the probity and chastity of this particular animal has not been assailed, nor do any of the witnesses attempt to swear that they had ever known *any* bald-faced bull calf to be guilty of the youthful indiscretion charged generally against ordinary calves. And the baldness of the face of this H. O. W. calf creates an almost conclusive presumption of his innocence. Yet appellant would have it believed that he abandoned his mother, together with all sense of propriety, and ran eight miles and broke through a barb-wire fence, for the purpose of associating with Jesse Smith's cows in amorous dalliance."

ONE morning, recently, a specimen of the genus hobo (genus hobo, mind you, not genus homo merely) was brought up before a Michigan police justice for vagrancy. Warm weather was coming on and the defendant did not anticipate with relish ten or fifteen days in the county jail. In consequence he pleaded not guilty. The law guarantees to every man a speedy trial and the man received his in seven minutes. Two or three policemen were sworn and testified to having found the stranger hanging about the railroad yards. When they had finished their stories, the justice turned to the defendant and asked:

"Have you anything you want to say? I guess we're through."

THERE is now a prominent lawyer of southern Kentucky who may be called Marble, because that isn't his name, who upon his first attempt to address a jury came near making as complete a failure as did the learned, though modest, Dominie Sampson, of whose ignominious flight from the pulpit Scott tells us. He was to make his maiden speech in a murder case, his talk having been prepared by an older and more able attorney. He had committed the piece well to memory, had rehearsed it in dramatic style time and again, and expected with his eloquence and legal lore to surprise the judge and his friends, capture the jury and win his case. The court-room was crowded when Mr. Marble, in a self-confident manner, began:

"It has always been the law in this State, and according to the Statute of 1779—." Here he turned pale, then started again: "It has always been the law in this State, and according to the Statute of 1779—." Here he balked again, scratched his head, and looked around at the judge, jury and spectators in a pitiable way; but regaining new courage, he raised his voice and exclaimed: "It has always been the law in this State, and according to the Statute of 1779— whose contents I forget, I believe I shall sit down."

The court-room was convulsed with laughter, while the old judge, with a smile upon his face, looked over the railing at the trembling, red-faced young man, and said:

"Well, Mr. Marble, you have gone a good many years back to find authority to take a seat."

THE lawyer's clerk was seeking information.

"Is the 'a' in this word pronounced like 'a' in 'clam' or like 'a' in 'claim'?" he asked.

"It seems to be preferable to pronounce it like 'a' in 'claim,'" replied the senior partner.

"I thought perhaps that circumstances altered the case when we took that writ this morning in *Bell v. Jones*."

"How so?"

"Jones was in the corridor and you should have heard that mandamus."

IN speaking of Lord Esher, a writer in *The Law Times* says:

Under his *régime* Court of Appeal No. 1 was at least never dull. A visitor had not been there two minutes before he was laughing at some sally of Lord Esher. The Master of the Rolls was declaring — *à propos* of the Kempton Park puzzle, What is a place? — that for his own part he thought every spot was a "place" except a tight rope; or telling the distracted wife of a debtor — who had gone down on her knees in court and implored him to "spare her husband" — not to talk nonsense about "the disgrace of bankruptcy, for all that is exploded now"; or, at the rising of the court just before the Long Vacation, saying to the Bar "Good-bye," and then with a merry twinkle in his eye, "for the present"; or — for he was not governed by precedent — placing a little granddaughter beside him

on the Bench, showing her the various documents in the case, and announcing to the Bar that a new judge had been appointed. How often, too, was he engaged in gay and gallant badinage with the lady litigant in person. One of these, who wanted him to try her case himself, once delighted him greatly. He had been telling her that her case had been sent to be tried by a certain learned judge without a jury, adding: "He is a capital lawyer, you know, and will try your case very nicely." "Oh, yes, my Lord," she replied, "Lord Justice — is all very well as to law, but my case requires so much common sense!" In a case relating to an alleged fraudulent prospectus, the counsel before him was arguing that the prospectus had deceived a large number of persons, including some country clergyman, who had been induced to apply for shares in a worthless company. Lord Esher was unconvinced and incredulous, and said: "Now, just imagine for a moment that I am a country curate." "My Lord," replied counsel, "my imagination is limited," and Lord Esher laughed as heartily as his brethren and the Bar.

THE following interesting declaration has recently been filed in the Supreme Court, Erie County, New York, in the case of *Fendal v. Logan*: —

The above named plaintiff by her attorney for cause of complaint alleges: first, that the defendants reside in the city of Buffalo, in the County of Erie and State of New York.

Second, that defendants in this action sustain the private relations of husband and wife, and that on the thirtieth day of October 1901, the husband and a co-defendant in this action permitted and sent his wife, also a co-defendant in this action, to ride out in a horse and buggy, a horse and carriage, a horse and phaeton, or other vehicle, either for pleasure or for other purposes, upon Main Street in the city of Buffalo, N. Y., and while the wife and co-defendant was prosecuting her mission of pleasure, or performing other duties as she was permitted and for which she was sent by said husband, she the said wife between the hours of three and four o'clock in the afternoon, was driving the said horse and buggy or other vehicle, wrongfully, carelessly, and negligently, without warning or caution, drove against and upon, and by means

of the shaft of said vehicle and by means of the tramp of the horse's hoofs, knocked down and ran over the plaintiff as she was making her transit from Niagara Street car to Main Street for the purpose of completing her trip down town, and while the plaintiff was in the act of crossing Main Street, after looking up and down Main Street, and having seen said horse and vehicle standing, moved onward, and while in the act of crossing Main Street, the said wife and co-defendant with reins or horse whip, struck the horse suddenly, rushing upon, and driving over as aforesaid, and by an irresistible force the plaintiff was thrown with violence upon the street. The injuries sustained by the plaintiff in detail are those of a sprained back, dislocated womb, resulting in an abnormal or pathological condition of the ovaries. The plaintiff is a domestic, and as such has no other means of livelihood than that of her earnings as a domestic, such as doing general housework, and as a result of the aforesaid injuries plaintiff for a time was confined in the Sisters' Hospital at her own expense, and for a long time thereafter she has been so disabled as to necessarily reduce her weekly receipts from \$3.50 to \$3.00 per week, the employers having to hire an assistant for plaintiff.

That the injuries inflicted internally upon the plaintiff as well cripple the back, rupture the liver, dislocate the womb, and render the ovaries abnormal, greatly shock the nerves and nerve centres as aforesaid in addition to great pain and long suffering, and also threaten protracted injuries, if not permanent impairment of plaintiff's abilities to earn a competent living as aforesaid, and thereby shorten plaintiff's life as aforesaid.

That such injuries to plaintiff were caused solely by defendant's negligence and that without any negligence on the part of the plaintiff.

Wherefore plaintiff demands judgment against defendants for the sum of ten thousand dollars (\$10,000.00), beside the cost of this action.

"DID you strike that jury?" asked the friend of the lawyer whose firm had just lost a justice court case.

"My only regret," replied the attorney, "is that I didn't."



MR. CHARLES PHILLIPS was retained in his early days at the Irish Bar for a lady — a Mrs. Wilkins — a rich widow of late middle-age, against whom an action had been brought by a lieutenant in the Royal Navy, who was much her junior, for breach of promise of marriage. The case came on for hearing at the Mayo Assizes. O'Connell, who led for the defence, was unable, owing to an affection of the throat, to address the jury. Phillips took his place, spoke most disparagingly of the personal charms of his client, laid stress on the great difference in years between her and the plaintiff, gained a verdict, and, on coming out of the court-house, was mercilessly horsewhipped all the way to his lodgings by his successful but humiliated client. — *The Law Times*.

CURRAN was one day engaged in a case in which he had as a colleague a remarkably tall and slender gentleman, who had originally intended to take orders. The judge observing that the case under discussion involved a question of ecclesiastical law, Curran interposed: —

"I can refer your Lordship to a high authority behind me, who was once intended for the church, though in my opinion he is fitter for the street."

#### LITERARY NOTES.

UNDER authority of the Detroit Bar Association, William L. January, Esq., has edited and compiled a full and interesting record<sup>1</sup> of the proceedings in Detroit and in Michigan on John Marshall Day, February 4, 1901. The principal addresses are those by Hon. Luther Laflin Mills, of Chicago, delivered at Detroit, and by Hon. Russell C. Ostrander, at Lansing. There is reprinted from the *American Law Review* a eulogy of Marshall by Hon. Alfred Russell, of Detroit. A tribute of respect to the memory of the late Mr. Justice Campbell, of the Supreme Court of Michigan, by Hon. John C. Donnelly, is also included.

Mr. January brings the volume to an end with several rarely published stories of Marshall, of which two may well be quoted:

<sup>1</sup> THE FIRST CENTENNIAL ANNIVERSARY, CELEBRATION AND BANQUET. "JOHN MARSHALL DAY," FEBRUARY 4, 1901. Edited and Compiled by William L. January.

"Not long after Marshall's marriage to Miss Ambler, after he had engaged in practice of the law, it is related that on one occasion, while young Marshall was attending court at the county seat and on what was then known as 'Court Day,' one of these so-called 'pohr white trash' came to Mr. Marshall's residence to see him about legal business. Mrs. Marshall was at home alone and politely told the man Mr. Marshall was attending court, and that he had better come again; but the unfortunate fellow seemed much excited and in great trouble, and insisted upon 'statin' his case' to 'de Misess.' Mrs. Marshall objected, and said she knew nothing about her husband's law business, and he must wait until his return: but the fellow insisted that he must state his case to Mrs. Marshall, and said: 'Now Misess, you spos'en the case; spos'en you was John Blair's old gray mare, an' I'd borrow you to ride to mill, an' you'd rare, pitch and tare, fall down and break your darn' old neck, you s'pose I'd pay for you? No! I'll be d-darned if I would!'"

"Shortly after Marshall's election to Congress, one day while Randolph, Marshall and another gentleman were riding down the 'ole Richmond road,' the gentleman referred to, addressing Randolph, said: 'Mr. Randolph, how can you tell a rascal in Congress?' To which he replied: 'Blindfold yourself, go into Congress Hall, and the first man you lay your hands on, say, "Here he is." But,' he said, 'you'll have to make an exception, because Cousin John [meaning John Marshall], you know, is in Congress now.'"

As each successive volume of the *Literary Index*<sup>2</sup> appears, one appreciates with increasing thankfulness the debt which the literary worker owes to the patient compilers of this index, the volume of which for 1901 has recently come from the press. In addition to the subject-index, covering 132 periodicals, the index to general literature, and the author-index, covering both of these indexes, there is an index of Bibliographies, a Necrology of writers deceased in 1901, and last — but not least, for it is of great practical value — an index to dates of the principal events in 1901.

<sup>2</sup> THE ANNUAL LITERARY INDEX, 1901. Edited by W. J. Fletcher and R. R. Bowker. New York: Office of the Publishers' Weekly. 1902.

## NEW LAW BOOKS.

COMMENTARIES ON THE LAW OF NEGLIGENCE IN ALL RELATIONS. By *Seymour D. Thompson, LL.D.* In six volumes. Vols. II, III. Indianapolis: The Bowen-Merrill Company. 1902. Law sheep. (li + 1134 pp.; lvii + 1118 pp.)

Perhaps no questions are more perplexing to the court lawyer than those which have to do with the law of negligence. Naturally the subject has attracted text-book writers. We have long had the excellent work of Shearman and Redfield on Negligence, to say nothing of the treatises of some eight or ten other writers; and the twenty or more volumes of *American Negligence Cases* and *American Negligence Reports* have saved many hours of weary research by bringing together, and classifying, negligence cases from different jurisdictions. Mr. Thompson himself published more than twenty years ago, — to be precise, in 1880, — his well-known two volumes on Negligence, containing leading cases followed by valuable notes; and two years before that time he brought out his *Carriers of Passengers*. But it is fair to say that there has not yet been a really full treatment of the whole subject by text-book writers. However, the call of the profession for such a comprehensive treatise will soon be answered — indeed, it has been answered in part already — by the very admirable "Commentaries" by Mr. Thompson. The two volumes before us — the second and third — mark the completion of half of the work.

Few American law writers have done more or better work than Mr. Thompson. His incisive style is well known to the readers of *The American Law Review*, and of his articles published elsewhere; and his text-book work has often — and justly — been praised. We think, however, that there can be no question but that his most important work is embodied in the series of volumes now coming from the press. In questions of negligence so much depends upon the facts of each particular case that it is essential not only that a large number of cases should be cited but that those cited should be stated with care and precision. These fundamental requirements in a book on negligence are well met in the present *Commentaries*. But the most important part of Mr. Thompson's work is his clear statement of the underlying principles of the law

of negligence, and his able discussion of them. He shows, as his long study of this particular branch of law would lead us to expect, a comprehensive grasp of his subject.

Volume III is given over wholly to the subject of Carriers of Passengers, which is treated in great detail; Volume II embraces the subject of Railway Negligence in all its relations except that of Carriers of Passengers and that of Master and Servant; it also includes the subject of liability of telegraph companies for negligence in failing to transmit and deliver messages promptly and correctly.

UNIVERSITY OF PENNSYLVANIA. THE PROCEEDINGS AT THE DEDICATION OF THE NEW BUILDING OF THE DEPARTMENT OF LAW. Compiled by *George Erasmus Nitzsche*. Philadelphia. 1901.

The University of Pennsylvania has issued, in a limited edition, a handsome volume containing a full account — with several illustrations — of the proceedings at the dedication of the new building of the Department of Law. A history of the Department of Law is given in the address of Samuel Dickson, Esq., and in an article by Margaret C. Klingelsmith, while Professor William Draper Lewis speaks on the educational ideal of the School. Mr. Justice Harlan's choice of a subject — "The Public Career of James Wilson, and the Principles of Constitutional Law for which he stood when the present Union was established," — seems most happy, in view of the fact that the opening lecture of the school was delivered, in 1790, by Mr. Justice Wilson. Professor James Barr Ames, of the Harvard Law School, delivered a characteristically able address on "The Vocation of the Law Professor"; Hon. Sir Charles Arthur Roe, of the University of Oxford, spoke on "The Constitutional Relations of England and her Dependencies"; His Excellency, the Chinese Minister, Wu Ting-fang, on "The Proper Relations of the United States to the Orient"; Professor Hampton L. Carson, on two noted Philadelphia lawyers, Eli K. Price and John Sergeant Price, — father and son; and Gerard Brown Finch, Esq., of the University of Cambridge, on "The Growth of the Ethical Element in our Common Law." Among the shorter addresses should be mentioned those of Mr. Dick-

son on the service done by lawyers in making the everyday law of the people what it is; of Judge George Gray on "The Judiciary"; of George Wharton Pepper, Esq., on "The University of Pennsylvania"; of John E. Parsons, Esq., on "The American Lawyer," and of Richard C. Dale, Esq., on "The Philadelphia Lawyer." It is a matter of congratulation that these exceptionally good addresses have been brought together in permanent form.

THE AMERICAN STATE REPORTS. Vols. 82, 83.

Containing cases of general value and authority, decided in courts of last resort of the several States. Selected, reported, and annotated by *A. C. Freeman*. San Francisco: Bancroft-Whitney Company, 1902. Law sheep. (1059 pp., 1015 pp.)

The notes in this series of reports are, as a rule, so excellent that one is sometimes tempted to consider the case as merely the hook on which the note is hung, and to leave the case itself unread. The two volumes before us draw from the reports of twenty-eight States, and include some cases decided as late as June, 1901. In the earlier volume the principal notes deal with "Evidence admissible as bearing on the Credibility or Bias of a Witness," with "Liability of Notaries"; with Judicial Notice of Localities and Boundaries"; with "the Effect of Writings in favor of 'Trustee,' but not indicating the Beneficiary or the Terms of the Trust"; and with the question of "What Covenants run with the Land." Volume 83, on the other hand, treats in its notes with such questions — among others — as these: "Power to create Liens by Receivers"; "Contracts between Attorneys and Clients"; Lienor of Vendor of Personalty"; "Mechanics' Liens on Separate Property of Married Women"; "The Effect of changes in By-Laws of Beneficial Associations against Pre-existing Members"; "Agreements respecting the living separate and apart of Husband and Wife"; and "Extra territorial Effect of Decrees of Divorce."

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by *William Mack* and *Howard P. Nash*. Vol. III. New York: The American Law Book Company. 1902. Law sheep. (1112 pp.)

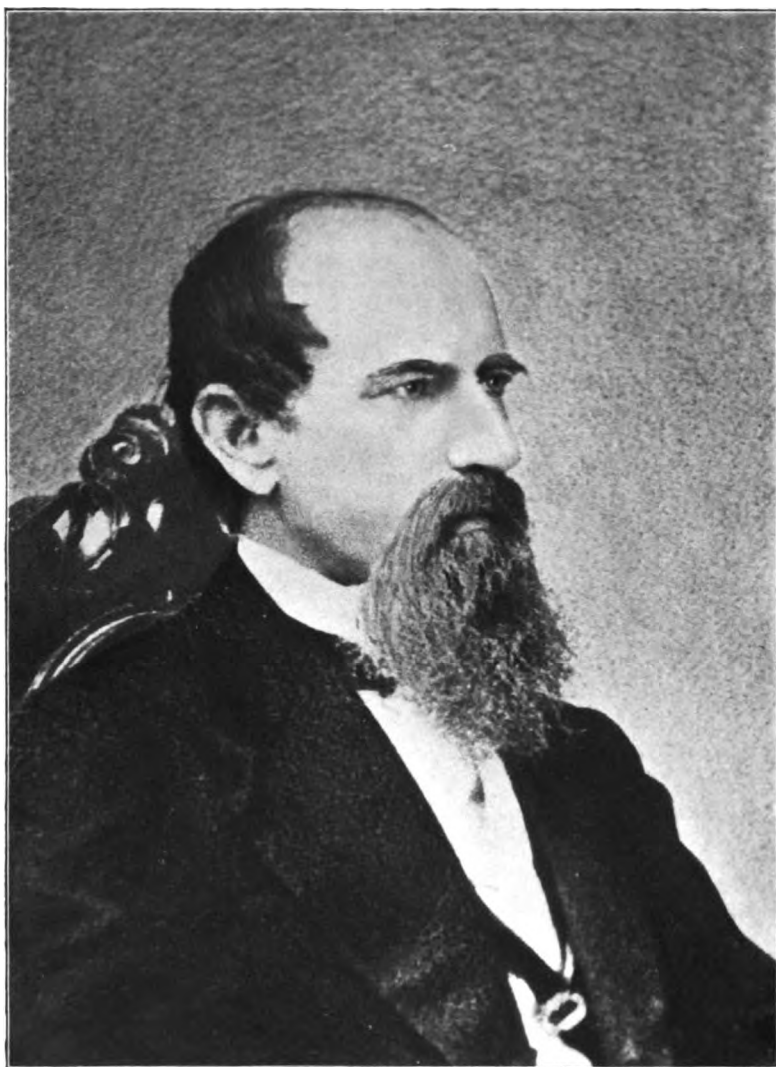
About a year ago, on the appearance of the the first volume, we spoke in a commendatory way of the *Cyclopedia of Law and Procedure*. The good impression which that volume made upon us is strengthened by an examination of the one now before us.

This third volume embraces subjects from "Appeal and Error" (which, however, was treated, in part, in the preceding volume) to "Assignee." The most important article is the one with which the volume opens, written by Hon. Walter Clark, Associate Justice of the Supreme Court of North Carolina. Mr. Justice Clark, who is not without experience as a writer of law books, will be remembered by readers of THE GREEN BAG as the author of the articles on the Supreme Court of North Carolina, printed in volume IV of this magazine. His contribution to the *Cyclopedia* is a treatise of five hundred pages on "Appeal and Error," — a length which enables him to treat the subject with satisfactory fulness. An interesting article, on a subject which lies outside the knowledge of the average lawyer, is that by Mr. Justice Sharpe, of Alabama, on "Army and Navy," although the sub-title "Courts of Inquiry" is not treated with such detail as might be wished. Among the other important articles are those on "Arbitration and Award," "Arrest," and "Assault and Battery."

THE LAW AND PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN JUSTICES' COURTS AND IN OTHER COURTS NOT OF RECORD, AND ON APPEALS TO THE COUNTY COURTS IN THE STATE OF NEW YORK. By *William Wait*. Seventh edition, by *Edwin Baylies, LL.D.*. In three volumes. Vol. I. Albany, N. Y.: Matthew Bender. 1902. Law sheep: \$6.35 per volume. (lxxi + 954 pp.)

Wait's *Law and Practice*, which was first published in 1865, has reached its seventh edition, the first volume of which has already appeared. The present volume treats, among other subjects, those of the Law of Contracts, Chattel Mortgages, Landlord and Tenant, Agency, Partnership, Bailment, Bills of Exchange and Promissory Notes, Sale, and the Statute of Frauds. The present edition has been revised and brought down to date. It would seem to be indispensable to the New York practitioner.





JONATHAN E. ARNOLD.

# The Green Bag.

---

VOL. XIV. No. 7.

BOSTON.

JULY, 1902.

---

## JONATHAN E. ARNOLD: A GREAT NISI PRIUS LAWYER OF THE WEST.

BY DUANE MOWRY.

JONATHAN E. ARNOLD was born in Woonsocket, Rhode Island, on the sixteenth day of February, 1814. His childhood days and school life were spent in his native New England. The opportunities of an excellent education were offered him and they were well improved, as his later life attested. He was graduated from Brown University, and thereafter studied law in the office of John Whipple, of Providence. Later he spent one year at the Harvard Law School, and was admitted to the practice of the law before attaining his majority.

Mr. Arnold was twenty-two years old when he left New England to establish himself in the practice of his chosen profession in the then undeveloped West. He arrived in Wisconsin during the summer of 1836, just after the act of Congress making Wisconsin a territory had gone into effect. It was in September of that year that Mr. Arnold located at Milwaukee, where he at once opened a law office, and where he continued in the active practice of his profession until his death, which occurred on the second day of June, 1869.

Mr. Arnold took high rank in his profession almost immediately upon his appearance in it in his Western home, a position which rapidly developed into the first place as a trial lawyer before juries, and particu-

larly as a criminal lawyer. In the defense, in criminal causes, Mr. Arnold did not have a superior in the entire West for more than twenty-five years, and he was, as one of his contemporaries put it to the writer, "without a peer" in the State of his adoption. This seems like exaggerated statement and fulsome eulogy. Yet members of the legal profession are not apt to indulge such estimates of their brethren, if there is no warrant for it.

The late Chief Justice Ryan, in announcing the death of Mr. Arnold to the Supreme Court of Wisconsin, made the following just and temperate observations of this great lawyer: "For nearly three and thirty years, Jonathan E. Arnold was a leader of the Wisconsin bar. For all that time, he discharged a large measure of its duties, wore a large share of its honors; a prominent figure among the distinguished lawyers of the territory and State. There are not many court rooms in the State — none, I think, of many years standing — which his eloquent voice has not filled, which his professional labors have not adorned. For over a quarter of a century, he has filled a large place in the public view; known of all men as a lawyer of fine talent, thorough training, untiring energy, singular address, bold, yet prudent, of remarkable force always, tenderly pathetic at times, of rare

eloquence whenever the occasion inspired it. Eminent as he was for professional ability, he was perhaps even more distinguished for his professional character. He was every inch a lawyer, thoroughly professional in mind and habit. He was remarkable for his professional bearing; a living model of professional *esprit de corps*. He was no wayward genius, occasionally exciting wonder or admiration. He was a man of disciplined and practised talent, always equal, always efficient, bringing to every cause the just measure of ability it needed or admitted. He was singularly self-reliant; his powers were always in singular self-command. He never forgot himself or the occasion. Always great, he was greatest in jury trials. He was a study of professional dignity. Nothing distracted him, nothing disturbed him. He never wasted a word or a gesture. His conduct of a cause seemed like a piece of accomplished acting. And, at times, he may have seemed artificial. But his efforts were always earnest and thorough. Weighty in thought, chaste in language, graceful in manner, he habitually illustrated his own conceptions of professional carriage. He has left vivid in all our minds a very distinctive professional memory, which will never leave us in life. *Quis nostrum tam animo agresti ac duro fuit, ut illius morte nuper non commoveretur? Qui, cum esset senex mortuus, tamen, propter excellentem artem ac venustatem, videbatur omnino mori non debuisse.*"

This estimate of the lawyer, coming from the lips of his ablest and most vehement antagonist in the trial of causes, can be accepted as a fair and just measure of Mr. Arnold. But there is other testimony which corroborates this view. A living member of the Milwaukee Bar, who knew Mr. Arnold during the last fifteen or twenty years of his life, says: "Mr. Arnold had no supe-

rior as a jury lawyer during his time. He excelled, particularly, in criminal practice. He had the happy faculty of not 'shooting' above the heads of the jury. He was the acme of professional honor. He was an exact man. His pleadings were prepared with great accuracy, and rarely were changes or interlineations necessary. He was not a verbose man. He did not speak for the applause from the galleries. Yet, when he had anything to say, he could say it, and say it well. He was, essentially, a man of ideas." Another Milwaukee lawyer who used to meet Mr. Arnold in the trial of causes, has said: "Mr. Arnold was logical, graceful and polished in diction, but able, with consummate art, to suit expression to the mental capacity and culture of his hearers. He was a serious man, rarely, if ever, did I see him smile. While he was grave he was also earnest. His oratory was often, impassioned. But he was most skillful in the examination of witnesses and adroit in the art of winning the confidence and sympathy of an unsuspecting jury. When he spoke he always had something to say, something worth hearing."

His learning, outside of the law, was of a high and commanding nature. It has been said that "no man, except the late Judge Ryan, ever practised law in Wisconsin, whose breadth of learning relating to matters outside of the legal profession, equalled that of Mr. Arnold." Thoughtful subjects always awakened his interest and attention. "He was stately, courtly, richly humorous or eloquent, never out of temper, pouring out such outbursts of rich speech that the jury sat dumb beneath the spell."

Naturally, one whose attainments are of such admittedly high order awakens some interest and provokes the inquiry: What did he do? In what specific case or cases did his talents shine? In what follows an

attempt will be made to answer these questions.

Mary Ann Wheeler shot and killed a man by the name of John M. W. Lace, in Milwaukee, at about midday, on the fourteenth day of October, 1852. The shooting was done on one of the principal thoroughfares and in the presence of a number of eye-witnesses. The fact of the killing could not be gainsaid. It was said that improper relations had existed between Lace and the accused, and that Lace had been exhibiting some letters of the defendant admitting her folly. Mr. Arnold interposed the plea of temporary or emotional insanity for Miss Wheeler. He was able, by some very cleverly drawn instructions, to get them submitted to the jury by Judge Hubbell. And, although the first jury disagreed, a second trial was immediately demanded and the prisoner was acquitted. These trials occurred in May, 1853, and this was regarded as a new and bold defense in such cases.

Mr. Arnold's opening remarks in summing up for the defense in that case are a model of their kind and are reproduced here. They were carefully prepared and committed to memory, and, it is said, created a wonderful effect on the jury. "How strange are the vicissitudes of human life! Two persons, hitherto almost strangers, become suddenly the victims of a train of circumstances by which one is hurried to a premature grave, and the other, after months of incarceration in a loathsome jail, is arraigned before a jury of the country on a charge of wilful murder. For what wise purposes these vicissitudes have been made a part of the destiny of man has never been revealed to us by the Author of our existence. Had He appointed the incidents which beset our path to the degree of our rank in the scale of created beings; had

He subjected us only to the whirlwind, the earthquake or the tornado, it might have seemed to our limited capacities some slight proof of the superiority of our nature. But we are humbled to the dust when we reflect that the very worm that crawls at our feet—that his life is held by as strong a tenure as man in all the glory of his strength. It has been supposed by some that the fear of death was implanted in the constitution of man in order to restrain him from the exercise of that larger share of power with which he is endowed. But all other animals upon our globe have been created with limited capacities and limited spheres of action. Their power is present. It does not extend beyond themselves, and hence the fear of bodily pain has been supposed to be sufficient to restrain them within their limited spheres. But for man, with a body framed for vigorous exertion in every clime, with a mind unlimited in capacities and unceasing in effort; for man whose power extends not only to the present, but through future generations, some stronger restraint has been necessary than the fear of physical pain. It consists in the terror of that unknown region to which we are all rapidly hastening. A well-spent life, the affections, the sorrows and tears of those we love, may persuade us of our merits, the principles of sound philosophy may sustain us, the hopes of divine religion may console us, but nature will assert its dominion, and we, instinctively, shudder at the silence and the gloom of the grave. There sensuality, ambition, malice, revenge, all passion, is laid low in the dust. There the tenderest earthly ties are snapped asunder forever. There Alexander left his world unconquered and Cræsus parted with his gold. There Bacon forgot his learning, and Newton descended from the skies. There friend is unlocked from the arm of



friend, brother from the arm of brother. There the father takes the last look at the body of his cherished son. There the dotting mother, day by day and night, moistens with her tears the clod that embraces her darling infant in its bosom.

"Stoics may reason, philosophers may speculate, the hardened may scoff, the thoughtless may smile, but there is a voice from the grave that speaks, that *will be heard*, in every human heart. But awful as is this fear of death, the grave, and the future, the history of our race illustrates nothing more clearly than that man is still prone to error and crime. Arson still applies the midnight torch; burglary still breaks stealthily into our dwellings; insatiate lust still preys upon the young and beautiful; murder still stalks abroad undetected and unpunished. Hence, gentlemen, you see at a glance the very foundation of our criminal law; it is based upon the necessities of our condition; it is founded upon the very first principle of moral ethics, and is designed to be in subserviency to the laws of God. The rule of ethics is that every man is entitled to do what he pleases, so long as he does not interfere with or trespass upon the rights and equal privileges of others. Hence, our laws, both civil and criminal, are based upon the necessities which arise from social organization, or from the very idea of government."

The trial of William Radcliffe, a blacksmith, for the murder of David Ross, created more feeling than did that of Mary Ann Wheeler. Mr. Arnold defended Radcliffe, and although the case for the State was represented by able counsel, secured his acquittal. While the evidence in this case was mainly circumstantial, the proofs seemed so convincing that the trial judge, when he asked the foreman of the jury if that was their verdict, being one finding the

defendant not guilty, and being answered that it was, was induced to reply: "Then may God have mercy on your consciences." Mr. Arnold excelled in his conception of defenses in criminal cases, and in his execution of them as well. It is said, too, although very skillful in the examination of witnesses, he never was abusive, and he treated them and the Court and opposing counsel with the utmost deference and respect.

Mr. Arnold was the chief counsel for the defendant in the trial of the impeachment of Judge Levi Hubbell before the Wisconsin Legislature in 1853. The case was vigorously, it might be said with truth that it was bitterly, prosecuted, and was vigorously defended. Mr. Arnold's defense was masterly and he secured the acquittal of his client. Judge Hubbell was charged with "corrupt conduct in office and with crimes and misdemeanors," as provided by the constitution of the State. There were, however, eleven distinct charges in the articles of impeachment, and sixty-nine specifications. It was the first and only impeachment of a public officer under the constitution, consumed more than a month in its trial, was thoroughly exhaustive on both sides, and was conducted with great ability.

It is not the purpose of the writer to go into the history of this case, which is but little less notable than that of the impeachment of President Andrew Johnson. The limitations of space forbid that. But there are some things in Mr. Arnold's arguments in both of them, which appear so eminently sound, that the opportunity to present some of them cannot be entirely ignored.

Mr. Arnold had not proceeded far in his opening argument before the Senate of Wisconsin, which, by the way, followed the opening argument for the managers and their testimony-in-chief, when he said:

"The power of impeachment is, indeed, a tremendous one, and may not inaptly be compared to Goliath's sword, kept in the temple, never to be used but on great occasions. It is, indeed, no trivial cause that will justify the State to arrest one of its officers, endowed for a period with the administration of a portion of the sovereignty, and in the exercise of its functions, and to arraign him before you as a culprit. And if you will recur to the history of our fatherland from which we have derived this proceeding, you will find but too many most solemn illustrations of the truth of these remarks. You will find in but too many instances in its mad spirit that it has confounded the innocent with the guilty—you will find in but too many instances that it has sacrificed illustrious victims to the spirit of relentless persecution—you will find in but too many instances that it has poured out the blood of patriots as an atonement to the demon spirit of party—you will find but too many instances of oppression, of cruelty, and of foul injustice, that would extort from any mind the concession that it is, indeed, a tremendous power. And even in our own land, where the safeguards of law are so well thrown around, not only the private citizen, but the public officer, it is still a fearful power. It speaks in the name and with the potential voice of the people. It commands all the resources, energies, and treasure of the government. It enlists all the genius and talent and eloquence of counsel, quickened, it may be, by a sense of malevolence, and inspired, it may be, with the love of fame. It may throw around the respondent a network of circumstances, and of proof that almost baffle explanation. It may kindle around his devoted head a blaze of prejudice and of passion, which may, for the moment, swerve reason from its throne, and

enfeeble the power of truth; and the victim alone and helpless, may, day after day, be the object of ridicule, of contempt, and of scorn, and he must seal his lips in reverential silence, and if, perchance he sheds a tear over the mistakes, the falsehoods or the malice of his accusers, the foul accusation follows him through the streets, that that tear which anguish has wrung from his eye, is but the tear of dissimulation, or of confessed guilt. But I tell you that though you may torture the victim, he is not wholly within your power. Neither his life nor his reputation are within your grasp. Thank God his accusers are not his judges; but to this body—to this Court—cool, deliberate and independent—to this Court, made up of the intelligence, and the wisdom, and the independence of the State, he now appeals with unshaken confidence, and with manly courage to hurl back the accusations of the prosecution, and to vindicate his innocence before the world."

With such an impassioned introduction, the interest of the Senators was at once aroused, and their attention was held throughout his masterly presentation of his client's case. A large part of Mr. Arnold's opening, was given up to a discussion of the legal phases of the case, to a consideration of courts of impeachment, to a definition of terms, to the nature and degree of proof required in order to convict, and to other purely legal questions, making his argument to the average layman admittedly prosy and dry. But Mr. Arnold was able to say something worth listening to. Even his consideration of legal questions and terms kept the Senators interested. His discussion of the term impeachment, as it is used in the Constitution of the United States and of the several States in the Union, its origin, history and definition; of what officers are impeachable under the Constitution; of what

are impeachable offenses; of what is impeachable matter and who is to determine it; of who are "civil officers" within the meaning of the Constitution; of what is "corrupt conduct in office," and "crimes and misdemeanors" within the meaning of the constitutional provision; these questions are all considered in a most luminous manner, both under the authorities and from general principles. It will not be possible to reproduce many of these discussions. The limits of this article will not permit it. But we cannot forego the pleasure of presenting a few of them.

Here is Mr. Arnold's original discussion of the phrase "corrupt conduct in office." Not only is it unique and sound reasoning; it is also a classic in the law:

"I am not aware that we have any definition in our statutes, or in the common law, or in the works of writers and commentators on this term. I do not know, for I have not examined, whether that term is used in the Constitutions of the other States of the Union. It is not, however, a legal term; it is not known to the statute; it is not known to the common law. It is a moral term, and we must arrive at what was intended by it in the best way we can. It is possible it was a phrase introduced into the Constitution, on account of the uncertain construction of the terms 'crimes and misdemeanors,' and was designed to include such official misconduct as was obviously not indictable. It may have been used designedly by the framers of the Constitution, to remove any doubt as to what was impeachable under the terms 'crimes and misdemeanors,' to settle the question whether it embraced anything that was not indictable, whether this general phraseology was not used to embrace any official misconduct, which could not be punishable by statute. It certainly does not include errors

of judgment, mistakes, nor indiscretions, nor imprudences, for these are not corrupt, they are not contaminated with any moral taint. To establish corrupt conduct in office, there must be a wrongful act done with a bad motive, or with a guilty intention; in other words, to establish corrupt conduct in office, it must not only appear that some wrongful or illegal act has been done in office, but that it was done corruptly; or in other words, knowing that it was wrongful or illegal. The question is not so much as to the act as to the motive or intent with which it was done. The burden of proof on an impeachment in such a case, is on the prosecution; not only to show clearly the act charged, but also satisfactorily beyond a reasonable doubt, the corrupt intent. These are the positions which I assume and conscientiously urge upon the consideration of this Court: that before the respondent can be convicted on an impeachment for corrupt conduct in office, it must be made out clearly by the prosecution that some wrongful or illegal act has been done by him, and they must make it out further to the satisfaction of the Court, beyond a reasonable doubt, that he has done an act intentionally and corruptly, knowing it to be wrongful or illegal."

Mr. Arnold argued with great force and earnestness that impeachable matter was solely within the province of the Court; that it was for the Senate to say what it is on which they will compel the accused to defend himself before them, what it is that gives them jurisdiction over the case, over his person, and over his fate. This view was opposed by the other side. Mr. Arnold expressed surprise that "the position was taken and urged upon this Court, that in the absence of any definition of what is impeachable matter, under the head of corrupt conduct in office, or crimes and misdemean-

ors, it was the province of the Assembly to determine the matter, and that the Court was bound by that determination." He characterized the suggestion as "a monstrous proposition," and then continued: "If he (the opposing counsel) had asserted that parliamentary usage could not be referred to—that the common law could not be referred to for light—that the meaning of these terms were wholly unsettled, and that it was left to the arbitrary power and caprice of the Senate—that proposition might not have surprised me; and that proposition in the language of these authorities is the only alternative left when you discard parliamentary usage and common law. But no lawyer has ever contended that it was for the House of Representatives, that it was for the impeaching body, not only to fix the nature of the accusations, but to say that they constitute necessarily impeachable matter, and that the Court, the Senate, must take jurisdiction, and must act, too, upon the judgment already obligatory upon them, by the very body which accuses, making the Senate, in point of fact, the mere instruments to carry out the design of the prosecuting body. Such is not the theory of the law of impeachments. Such is not the theory of the jurisdiction and power of the Court which is to try them. If it were so, I should, indeed, pity the public officers of a State. I should pity, in this case, the respondent at the bar. It is one thing to accuse, it is another thing to prove, and it is another thing to convict; and if the Assembly may declare what is impeachable matter, and send that matter to the Senate, and the Senate is bound to accept it as impeachable matter, then there is no safety in holding office. The argument goes to the extent, if I understand it, that if the Assembly see fit, in any given case of impeachment, of any public officer

to accuse him before the Senate in the form of impeachment, with certain acts—that the Senate is bound to entertain that impeachment after the judgment is already entered up, that these acts are impeachable, and that the only duty of the Senate is the duty of a jury to find the facts to be truly alleged; the Assembly, in fact, constituting the Court that renders the judgment, and renders it in advance. This is not the doctrine of the law. If so, what protection is there for any public officer, accused against party spirit, against personal rancor, against the spirit of persecution that may pervade the Assembly, and may prompt it to put charges of a trifling character, of no account, totally malicious, against the victim it wishes to hunt! And, forsooth, the Senate must regard it as impeachable matter, and all it has to do is to be the party to impeach . . . . If this doctrine be true, as contended for by the learned counsel, it invests the Honorable Assembly of this State with the power of passing the most odious *ex post facto* laws, and, in substance, directly violating the inhibitions of the Constitution, because it clothes the Assembly with the power to declare what was innocently intended, a criminal and impeachable act. It converts the Assembly into an inquisition, which may seek out and inform on the conduct of the accused party; and although it may have been innocent, and known to have been innocent, yet it may declare it impeachable, and send it to the Senate in the form of an accusation, and in that way determine the judgment that is already entered. It is only making that a criminal and impeachable act, which, at the time it was committed, was entirely innocent."

Mr. Arnold's argument was followed with authorities sustaining his contention, but they are too lengthy to even attempt a synopsis of them for this article.

To the charges filed against his client, Mr. Arnold entered a general plea of not guilty. Opposing counsel referred to this plea as the felon's plea, and expressed surprise to witness it. Mr. Arnold was very happy in his reply. He said: "Why, Mr. President, if I were to believe the one half that the counsel has charged or insinuated against the respondent, in the course of that argument, or speech, I am surprised that he should be surprised that the respondent should have put in the felon's plea. I should suppose, if his estimate of the respondent is such as was exhibited in that argument, that the felon's plea would be precisely the plea which he would have expected; for we cannot expect, in reference to any expectation of the counsel, anything else than that the respondent at the bar is, indeed, a felon, or no better than a felon; but he does say that he is surprised that the respondent should put in such a plea. May it please the Court, it is a usual plea, an entirely proper plea, not for felons alone, but for honest men who are unjustly accused of crimes."

Another case of great public interest and importance was the contest for the office of Governor of Wisconsin in 1856. It was commenced by the filing of an information in the nature of a *quo warranto* in the Supreme Court, the highest judicial body of the State, by the Attorney General on the relation of Coles Bashford *v.* Wm. A. Barstow. The case was fought on both sides with great ability. Mr. Arnold was chief counsel for the unsuccessful party. The case is reported in volume four of the Wisconsin reports, and is a leading case in its special field of judicature. It is not intended to give any extensive account of that case. Mr. Arnold's contention was that the Court had no jurisdiction; that the question before the Court was a political, rather than a judicial one; that

the alleged usurpation was a political usurpation of the functions of one of the coördinate departments of the government; a wrong, if established, to be remedied by political, and not by judicial power. The Court did not accept his view of the matter. Nevertheless, Mr. Arnold's argument is exceedingly interesting and ingenious. His plea for the separation of the powers of the different branches of the government is particularly well put and sound.

"If in these sovereign and independent States, there is reason to fear the overshadowing power of the general government, and especially the encroachments of the federal judiciary, then in each individual State, there is reason to fear that one department may acquire an undue weight and crush and overwhelm the government. And just so certainly as any one department attempts the subordination and the subjugation of another, then there is danger either of revolution, or the liberties of the people may fall with the integrity of their government. We want in this land no such ruins for the mournful admiration of posterity. The traveler who in the elder world gazes on the ruins of the Coliseum or the Parthenon may wonder and admire over the magnificent relics of a work of perfect art. In this land we have erected an edifice neither Doric, nor Ionic, nor Corinthian, nor yet Gothic, but purely American in its order, the most beautiful and perfect which this world has ever seen,—the edifice of constitutional, American liberty. It is the work of the people. It is the hope of the people. It is the hope of the world for the emancipation and progress of our race. And I place the mark of treason upon the brow of every man, be he of the North or the South, on the bench or off the bench, who dares to cast one spark of fire beneath the pillars of that glorious edifice. In this

contemplation, I have lost long ago all partisan feeling and all political ties. The platform of the Constitution is the only ground of safety."

Mr. Arnold held few elective offices. Early in his professional career he was district attorney of Milwaukee county. In 1840-41, he represented Milwaukee in the territorial council. In the latter year he was the Whig candidate for delegate to Congress, but was defeated by Governor Henry Dodge. Mr. Arnold frequently represented his party in State and national conventions. He attended as a delegate the National Whig Convention which made General Scott its standard-bearer. Mr. Arnold was greatly disappointed at the result of that nomination. He was a great admirer of Daniel Webster and had gone to that convention with a full determination to be satisfied with nothing less than the great statesman's nomination for the Presidency. When the final dissolution of the Whig party came, Mr. Arnold cast his fortunes with the Democratic party. He remained with it the balance of his life. In 1860, he was that party's candidate for Congress, but was defeated by John F. Potter, of "bowie knife" fame. He was never again a candidate for any other office. Mr. Arnold was a staunch friend of the Union during the war of the rebellion. He assisted the Union cause with both voice and pen. Some of his speeches on those occasions possessed great power and eloquence. In governmental affairs, however, it is well known that Mr. Arnold was a pronounced conservative. And owing to his tastes, habits of

thought, and retiring disposition, he was not particularly strong with the masses. His political successes were certainly a minus quantity.

In pursuing his investigations of the subject of this paper, the writer has been forcibly reminded of the transitory character of the fame of a great lawyer. He lives uppermost in the events and affairs of his time, dies, and is forgotten. Others appear contemporaneously, possessing inferior qualities of head and heart, make history, and give to the world names that do not die. They are not truly great. And yet their names are household words, and their fame seems to be green always. While the member of a great and noble profession, who exercises the highest order of ability, has in his keeping confidences and destinies of the most sacred and delicate nature, protects the rights, interests and properties of those who are threatened with danger, the consequences of which may be far-reaching, not only for the present generation, but for generations to come, has only a small share of passing commendation, goes into the shades, with a life-work a vague and indistinct memory, unheralded and unsung. It is unfortunate that this is so. Yet who is to complain? Mr. Arnold was admittedly a great lawyer. The few remaining living contemporaries attest that. Great as he was, great in ability, great in knowledge, great in conscious power, as a lawyer and an orator, but a comparatively few years yet remain before his name and fame will have passed into oblivion. Such is the mandate of Time. Such is the decree of History.



**EXTRADITION.**

BY LAWRENCE IRWELL.

MANY and intricate as are the problems of international law, the question of extradition remains the most important and the most familiar. The complexity of business transactions and the vast extension of credit, coupled with the multiplication of the means of travel, have rendered the subject one of the greatest importance. The historic origin of the practice is to be found in the relations of the different provinces of ancient Rome. Under the Republic a citizen accused of a capital offense might at any time, before judgment was pronounced, escape the sentence by going into voluntary exile; and certain of the allied cities were specified by treaty as inviolable places of refuge; but, under the Empire, these cities were absorbed into the imperial dominions and lost their protective character. As to claims of extradition made by the Romans upon independent nations, they seem, as far as I can ascertain, to have been confined to enemies of the State. Thus we find that at the end of the war with Antiochus, king of Syria, the Romans stipulated for the surrender of Hannibal, who, however, escaped and fled to the king of Bithynia, from whom he was also demanded, and would have been surrendered had he not committed suicide.

It is a remarkable fact that in the early cases in modern history it was always for political offenses that surrender was claimed, although at present it is almost the only ground of refusal. But such an offense does not mean a crime committed from political motives, but one committed during a time of civil war or open insurrection. The French government, in 1880, refused to extradite Hartmann, who was suspected

of planning the plot against the Czar of Russia at Moscow, in December, 1879. When the Swiss government, in November, 1890, demanded the extradition of one Castioni, who had shot a member of the ministry, the English judges gave him the benefit of the exception in the extradition treaty which provides for the safety of those who are charged with having committed crimes during a period of open insurrection.

The English king, Charles II., as is well known, pursued some of the murderers of his father with relentless hate, and in 1661 concluded a treaty with Denmark in which the latter agreed to deliver upon requisition all persons who had been concerned in the murder of Charles I. The States of Holland surrendered some of the regicides without treaty stipulations, and in 1662 they agreed to give up to the English government all persons except those who, in England, would not have come under the British Indemnity Act. James II. of England demanded the surrender from Holland of Gilbert Burnet, not then a bishop, but acting as private secretary to the Prince of Orange. He describes the affair very fully in his *History of Our Times*. He asserts that the English king's principal cause of anger against him was a report of his intended marriage to a wealthy lady at The Hague. Proceedings for extradition were set on foot in Scotland. Burnet, however, heard of the matter before news of it reached D'Albeville, then English ambassador, and he petitioned for naturalization, which was readily granted. When the ambassador demanded his banishment, Burnet claimed protection of the Dutch States as a

naturalized subject. The demand was subsequently repeated in more forcible terms; but Holland refused to surrender him.

One of the most familiar cases of extradition for a political offense was that of Napper Tandy, known popularly as the hero of the "Wearing of the Green." Tandy, having made a vain attempt to excite a rebellion in Donegal, Ireland, set sail for Norway; and after landing at Bergen, made his way with a few companions to Hamburg. The English government peremptorily insisted on the surrender of the refugees as British subjects who were in rebellion against their sovereign; while the French government claimed them as citizens, and threatened Hamburg with the most serious consequences if they were given up. After a long and painful hesitation, Tandy and three of his companions were finally surrendered to England in October, 1759. The French ministry retaliated by a letter declaring war against the town of Hamburg, imposed an embargo on its shipping, and threatened still severer measures. The citizens of Hamburg sent a most abject apology to Napoleon, describing their utter helplessness and the ruin that must have befallen their town if they had resisted. Their deputies, however, were received with the most bitter reproaches; they were told that they had committed a breach of the laws of hospitality "which would not have taken place among the barbarian hordes of the desert," and an act which would be their "eternal reproach."

In no country, perhaps, does the question of extradition take such an important place as in our own. At the formation of the Union, the question of the surrender of criminals who fled from one State to another was one of the difficulties with which the founders of the Republic had to deal. The proximity of Canada brought the question

within range of national politics; and it is very much to the credit of the United States judicial bench that its members were equal to dealing with the difficult questions that arose. "In the matter of extradition," writes Sir Edward Clarke in his well-known English work upon the subject of this article, "the American law was until 1870 better than that of any country in the world; and the decisions of the American judges are the best existing expositions of the duty of extradition in its relations at once to the judicial rights of nations and the general interests of the civilization of the world." The first case in America which brought up the surrender of a criminal to a foreign power occurred in 1784. In that year the Chevalier de Longchamps was indicted at Philadelphia for threatening bodily harm to M. Marbois, the French consul-general, and also for an assault upon him. It appeared that the Chevalier went to the consul's official residence, used violent language, and called him offensive names; two days later, in a public place, he struck at him with a cane. He was convicted; and subsequently President Washington informed the judges that the minister of France demanded that Monsieur de Longchamps, having appeared in the uniform of a French officer, should be delivered up to France. To this the judges answered that he could not lawfully be surrendered.

The most important question of extradition between the United States and Great Britain arose in the case of Charles Laurence in 1876, the point at issue being whether a person extradited for one crime could, after being tried and acquitted, be put on trial for another offense—an offense unconnected with the one for which he was surrendered—without being afforded the opportunity of returning to the country by which his surrender was granted. Laurence



was a Canadian, who subsequently became naturalized in the United States; and having gone to England, his surrender was demanded by the United States under the treaty of 1842, on the charge of forging and uttering a certain bond and affidavit. He was surrendered; and on his arrival at New York he was arrested on three warrants upon three separate indictments, none of them being founded on the charges for which he was extradited. While Laurence's case was pending, a demand was made on Great Britain for the extradition of Ezra D. Winslow on a charge of forgery in this country. Lord Derby, on behalf of the British government, absolutely refused to surrender him until the United States gave an assurance that he should not, until he had been restored or had been given opportunity of returning to British territory, be detained or tried in the United States for any offense committed prior to his surrender, other than the extradition crimes proved by the facts on which the surrender would be grounded.

The case caused much discussion at the time; and as recently as 1886 — sixteen years ago — a convention was signed by the late Mr. Phelps and Lord Rosebery which in one of its articles provided that a fugitive criminal should not be detained or tried for any offense committed prior to his surrender, other than the extradition crime, without having an opportunity of returning to the country from which he was extradited.

Turning to the strictly practical aspects of extradition, the following facts are of importance.

The United States Constitution provides that a "person charged in any State with treason, felony, or other crime who shall flee from justice and be found in another State, shall, on the demand of the executive authority of the State from which he fled,

be delivered up to be removed to the State having jurisdiction of the crime." An act of Congress of Feb. 12, 1793, carries the constitutional provision into practical effect by declaring that the demand shall be accompanied by a copy of an indictment found against the alleged fugitive, or by an affidavit made before a magistrate of a State, etc., charging the fugitive with having committed a crime. These documents are to be certified as authentic by the Governor or chief magistrate of the State whence the demand comes. It is thereupon made the duty of the Governor on whom the demand is made to issue his warrant and to cause the fugitive to be arrested and delivered over to the agent of the demanding State. The essential factors of the case are that there must be a charge that an act has been committed which is a crime under the laws of the State in which it took place, and that the person so charged has fled from justice. The Governor of the State where the fugitive is found is required to comply with the demand, if properly made and authenticated. I cannot, however, discover the existence of any legal method of compelling him to do his duty, in the improbable event of his refusing to do it. If the fugitive is believed to have been arrested on insufficient papers, the regular course to test their validity upon his behalf is to apply for a writ of *habeas corpus*. If they turn out to be defective, he will be discharged. When the proceedings are sustained, their effect is, of course, to return the fugitive to the State whence he came, where he will be entitled to his trial under the ordinary course of judicial proceedings.

Extradition as between separate nations is the limitation of the right of asylum. It was at one time believed that it was the duty of a State, under the law of nations, to surrender a fugitive from justice upon de-

mand, after the proper judicial officer had ascertained the existence of some reasonable ground for subjecting the accused to a criminal trial. Those who maintained this doctrine found much difficulty in drawing the line between the more serious crimes to which it was claimed that this rule was applicable, and those of a minor character to which it could not reasonably be supposed to extend. The general legal opinion today is that whatever obligation may exist in such a case is an imperfect one, and cannot be insisted upon by the demanding nation unless there is a treaty stipulation. Nevertheless, in certain cases, extradition without treaty has been allowed by and to the United States. In 1863, Secretary Seward surrendered a notorious criminal to Spain "under the laws of nations and the Constitution of the United States;" and Tweed was given up by Spain in 1876, as a return for the former courtesy. Many similar demands upon the United States have undoubtedly been refused, and I think it is fair to say that custom is against the practice. Whether there are legal objections to the practice or not, is an open question. In England, speaking generally, lawyers seem to be in favor of it.

In order to carry an extradition treaty into practical effect, domestic legislation is necessary. Under the laws of Congress and the procedure of the courts the following points must be observed:

(1) There must be a demand from the supreme political authority of the State desiring the return of the fugitive.

(2) There should be an authorization by the President directed to the United States Commissioner to investigate the case.

(3) Complaint under oath should be made to a Commissioner by a proper person, such as the Ambassador of a foreign country, showing the commission of the act

(the alleged crime) on which the demand for the surrender is based.

(4) There must be a warrant by the Commissioner for the arrest of the accused.

(5) The charge must be sustained before the Commissioner by suitable evidence, such, for example, as would justify his trial had the alleged crime taken place here.

(6) On the certificate of the Commissioner that there is probable ground to believe that the offense has been committed, and such certificate being satisfactory to the President, the surrender is made to the agent of the demanding country. As is well known, if the proceedings are defective, the accused may be discharged upon a writ of *habeas corpus*.

The United States have extradition treaties with a large number of foreign countries. The following list is as complete as I have been able to make it. I cannot positively assert, however, that every treaty is included in it. The most important treaties certainly are: — Great Britain, 1842, 1890; France, 1845, 1858, 1893; Germany, 1852; Austria, 1856; Italy, 1868, 1869, 1884; Switzerland, 1850; Holland, 1887; Russia, 1893; Belgium, 1882; Spain, 1877, 1882; Turkey, 1874; Sweden and Norway, 1860, 1893; Mexico, 1861; Japan, 1886; Nicaragua, 1870; Ecuador, 1872; Colombia, 1888; San Salvador, 1870; Haiti, 1864.

The above-named treaties cannot be said to be identical, but they are all of the same character, and their scope is about the same. They all include such crimes as murder and forgery, and most of them include robbery, burglary, arson, rape, embezzlement, and the making or circulation of counterfeit money, whether paper or coin. The words here employed refer to the offenses named as understood in the general jurisprudence of the two nations, and they could not be extended to any new statutory crime estab-

lished by one of the States of the Union, and called by a name used in the treaty. Upon the other hand, it is believed that the word "piracy," as used in the treaty with Great Britain does not refer to the offense as recognized in the law of nations, as the accused can be tried in the country in which he happens to be. Its reference is unquestionably to "piracy" under the local law of the State making the demand. The treaties require that the offense should be committed within "the jurisdiction" of the demanding nation. A question has arisen

in this country as to whether the words "within the territories and jurisdiction" are intended to include a case in which a nation by statute law has made it an offense for one of its own citizens to commit a serious crime outside its own territory, so that a surrender could be demanded by that nation, although the act was committed within the territory of a nation which had ample power to inflict proper punishment. While this point is not finally settled, the probability is that extradition would be refused by the United States in the circumstances named.

### A KENTUCKY COURT ROOM.

BY ENOCH JOHNSON.

ONE who is accustomed to the solemnity and decorum of procedure which prevail in courts of justice in the North, would have had his sense of the fitness of things rather rudely shocked, if he had paid a visit with me to a certain Southern court-room.

While on a short trip to a flourishing county-seat in Kentucky, I attended a criminal trial that was then on in the court-house. What I saw and heard furnished me with ample evidence that they do some things differently in the South.

The judge was a typical Kentuckian, free and easy in his manner on the bench, and with that peculiar, roseate hue of complexion which indicated that besides being a judge of the law, he might also be a fairly good judge of that delicious distillation which has made Kentucky famous. He was not one of your *judices doctissimi*, with pride of opinion that would not yield to argument. Not a bit of it. On the contrary, he seemed to take a delight in arguing the points with the attorneys in the case. When, for in-

stance, an objection to certain evidence would be made, which objection his Honor was disposed to overrule: "I don't see any good ground for that objection, Mr. Brown," the judge would say, clapping his hands back of his head, tilting his chair and elevating his feet to the top of his desk. Mr. Brown would rise and maintain that there was good ground for it. The judge would shift his quid from one side of his mouth to the other and come back with an answer; the lawyer would reply; the judge (in pleading parlance) would give back a rejoinder; the lawyer would rise with a surrejoinder; the judge would turn, fire a liquid volley at a spittoon about ten feet away (and in this display the accuracy of Kentucky marksmanship), and clinch his argument with a rebutter that usually left our friend Mr. Brown in sore straits for a surrebutter; and his objection would finally be overruled because the judge had the better of the argument.

But the man in the court room who in-

terested and amused me the most was the sheriff. That officer was a tall, raw-boned, thin-whiskered individual, who seemed, with his ubiquity and the variety of his functions to be pretty much the whole thing. He performed the duties of court clerk, jury commissioner, bailiff and *amicus curiae*. To him had evidently been left the business of not only summoning the venire-men, but of selecting them as well, for in filling the panel for the trial of the case he constantly consulted a pocket memorandum book in which he had apparently listed his jurors; and somewhat after the following manner would the panel be filled :

"Mr. James Kennedy," the sheriff would call out in his piping, treble voice.

"Present in court, suh," would come the response from Mr. Kennedy.

"Come up heah, please," called the sheriff; "take yo' seat thar in the jury-box."

"Mr. George Canebreak."

"Here, suh."

"Come up heah, please, set right down thar 'longside o' Mr. Kennedy."

"Mr. Clay Stubblefield."

"Heah I am, suh."

"Come up heah, please; take yo' seat thar 'longside o' Mr. Canebrake."

And so on until the panel was filled. In the course of the trial the judge interrupted the proceedings by calling out: "Better lower a couple of those back windows there, Mr. Sheriff."

"Yes, suh, all right, Jedge."

After lowering these windows the sheriff called back to the judge:

"Think we better have one open on the side heah, Jedge."

"Well, don't pull it down very far."

"All right, Jedge."

After thus improving the hygienic conditions of the court-room, the sheriff sidled

forward toward the bar; and now it was his turn to interrupt the proceedings. The crowd in the court-room had been surging forward and almost surrounded the jurors.

"Don't crowd that jury-box that-a-way," he cried out; "take yo' seats, gentl'm'n, take yo' seats."

At the beckoning of one of the attorneys in the case, the sheriff then went inside the bar, and responding to the whispered words of the attorney, pulled out his plug of tobacco, and after allowing the attorney to help himself liberally, passed on, and to my amazement went up on the judge's platform, that Holy of Holies, which with us is considered desecrated by any other than judicial feet, and standing beside the judge passed a few whispered pleasantries with him, for both chuckled quietly. The sheriff remained standing behind the judge for some little time looking out on the people assembled in the court room, ever and anon scratching his head or pulling at his billy-goat beard, waiting, apparently, until some real or fancied breach of the court room proprieties should require him to rush down and assert his authority.

But let no one suppose that because of this seeming departure from conventional decorum there resulted any miscarriage of justice. Far from it. There was something so democratic in the procedure of that Kentucky court-room, and so far removed from anything suggestive of star chamber proceedings, that one could not help feeling that here the people themselves were conducting the trial, and not some tribunal over and above them receiving its sanction from a power not in touch with them nor responsible to them. One is, therefore, ready to pardon the goddess of Justice for disporting herself in such a free and easy way, being convinced that she holds the scales evenly and metes out justice honestly.

## THE SOUL OF JUSTICE.

BY I. JAY POTTER.

WHAT subtle sense of Justice do I feel?  
What philosophic calm of mind and heart  
Comes o'er my soul, when, undisturbed by thought  
Of legal strife, I pass, serene, beneath  
The carved stone portals of the Judgment Hall,  
Where sits, dispassionate and calm of mind,  
And weighing, pro and con, the argument,  
For plaintiff or defendant, judgment gives, —  
A human judge, dispensing Law Divine.

And as I drink the words of wisdom in,  
And feel how hard he strives to guide aright  
The panelled jury's minds to wise decide,  
I feel that here, upon the earth, is found,  
At last, if not all wisdom, yet all good,  
And minds intent on Equal Rights to all.

Yet, well I know, despite insistent Peace,  
Which broods o'er all proceedings legal here, —  
Which dominates the souls of angry men,  
As permeates the chilly atmosphere  
Of morn the circumambient sun's ray,  
That evil thoughts are given audience,  
Full frequent, as from man to man is spoke  
The word, half jest, half earnest, in its weight,  
'Til one might think the air'd be saturate  
With hurtling thoughts and angry, fearsome looks.

Despite these floating human clouds perverse,  
Invisible, yet recognized by all,  
The mighty power of Justice dominates  
Th' entire auditorium and throng;  
And hushed is every voice, and stilled each breath,  
When, after long and arduous, nay, fierce  
Attempt to make the wrong appear the right,  
All eyes are bent and ears are turned to learn  
The verdict reached, — triumphant Right enthroned.

Here am I led to grant Divine instinct  
To human nature; which, thus, wills that Man  
May reap his just deserts for acts performed  
While passing through this modicum of Life.

# WAGER OF BATTLE.

BY M. S. GILPATRIC.

**A**MONG the ceremonies that, historically, should have attended the coronation of King Edward VII. is the appearance of the "King's Champion," who, armed, *cap à pie*, should ride into the assembly, and, after flinging his glove to the ground, should dare anyone to dispute the sovereignty of the king by picking up the glove, in which case he, the champion, would do him battle to the death.

It has been irreverently suggested that the present champion, who derives his honorable and perilous position by descent, should not be clad in armor, or have lance and sword, nor should he bestride a white charger, but that he should be clad in kahki, grasp a revolver and a magazine rifle, and ride in an automobile. We call this suggestion irreverent, because reverence is due to age, and it scoffs at a ceremony which is the last relic of a custom so ancient that its origin is obscure, but which, from the time of Charlemagne was in full force and effect throughout Continental Europe; which was brought into England by William the Conqueror, and which was recognized by the courts of England as late as 1818. We refer to the judicial duel, or Wager of Battle.

There is a wide distinction between the underlying idea of the Wager of Battle and private duelling. In the latter, a real or fancied grievance so inflames the minds of the parties that they feel that the world cannot contain them both.

It is the notion of the

"... two cats of Kilkenny,

Who said there is one cat too many."

But the former was a solemn appeal to the God of Truth to decide which of the parties

had committed perjury. The modern idea of a jury is an impartial body of men who have formed no opinion about the facts of the controversy, and who will be guided as to the law by the judge. In ancient times the jury were men of the vicinage, who were supposed to know the parties and something of the facts, and the parties themselves could sustain their averments by bringing in their friends as compurgators, who would swear that they believed the testimony of the plaintiff or defendant, as the case might be, and, as there were no rules of evidence, no ground of objection that the testimony was immaterial, irrelevant or incompetent, the witness could swear to anything that his friendship for the principal, his dislike to the adversary, or his own imagination prompted; the only restraint being that the person against whom he was testifying could break in on his narration, accuse him of perjury, and demand that the witness make good his statement by a duel. This style of objection not only stayed the trial of the cause, but really decided it, for, if the witness was vanquished in the duel, he was fined and had to make good any damage which his testimony might have caused to his opponent, to whom judgment was awarded.

In our day, a witness who is "summoned by a stern *subpœna*" to appear in court on behalf of a party, is told thereby that if he does not appear he will be mulcted in damages by the aggrieved party because he is expected to tell "the truth, the whole truth, and nothing but the truth." But in the age when Wager of Battle became a universal custom, a witness was an acknowledged partisan who came into court to

"swear the case through," and for this reason he came armed and had his weapons blessed before giving his testimony. This would seem incredible if it was not supported by a mass of historical evidence, and by the fact that it goes down to those deep springs of humanity, which no abstract reasoning can gauge. To tell a lie is sinful, as our catechisms have told us. But we have learned from Hugo that a nun can

of time, however, there obtained in some countries an extension of the custom in the nature of an appeal. The defeated suitor, instead of going down to the tavern and swearing at the Court, could challenge the Bench to mortal combat, and, if possible, reverse the decision by right of sword. But this privilege, although it extended to all criminal trials, and to civil causes wherein the amount involved exceeded what, in our



FIGHT BETWEEN RAYMBAULT DE MORUEIL AND GUYON DE LOSENNE.  
THE ABBOT OF ST. DENIS AT THE FEET OF THE ARCHBISHOP  
OF PARIS, TAKING OATH THAT HIS CAUSE, DEFENDED  
BY RAYMBAULT, IS A JUST ONE.

*From a manuscript of the Fifteenth Century.*

utter a saintly lie, as one did when she saved Jean Valjean from the police. The phrase "to lie like a gentleman" is well understood. The admitted impossibility of conviction in certain cases in Ireland and other places, even in our own country, show that men and women deliberately lie, not only to save themselves, but to help a friend.

Wager of Battle, therefore, became recognized as the best remedy for the perjury which was everywhere prevalent. In process

own currency, would be about twenty-five dollars, was not often availed of, perhaps for the reason that the judges in the minor courts were usually stalwart barons, who believed that "law was the power of deciding," and were quite willing to sustain their decision with lethal weapons. Moreover, the Court being a unit, no matter how many judges composed it, the appellant ran the risk of having to fight the whole Bench at once, in which case the judgment was.



probably "affirmed with costs" in a very emphatic manner.

But as a means of attacking the credibility of witnesses, the Wager of Battle was universally approved. In case of a challenge, as we have stated, the main trial was suspended while the question of evidence was argued "by apostolic blows and knocks." Women, priests and cripples were generally excused from defending their veracity by

two generations ago, when a stone in a stocking was used with terrible effect, will believe that the woman in this form of judicial duel generally had the best of it.

After several centuries of this procedure, a change took place, which, necessarily, although gradually, led to the abolition of the whole system. This change was the employment of hired champions to do the fighting in place of the parties. So many



DUEL CONCERNING THE HONOR OF LADIES.

*From a manuscript of the Fifteenth Century.*

vigor of arm; but in some parts of Germany even a woman had to accept the Wager of Battle, the disparity in physical strength being equalized by the man being compelled to stand waist-deep in a hole, with his left hand tied behind his back; while the woman had the full use of her limbs. As a weapon against his iron-bound club, she was armed with a heavy stone securely fastened in a cloth. Anyone who has read of the prowess of the female peasantry of Ireland in faction fights,

cases had occurred wherein the wrong party had prevailed and might had become right that a custom was accepted in all courts that a person whose veracity was impeached, but who was physically incapable of killing his accuser, could employ a delegate as a more potential vehicle of the decision of the God of Truth. The result of this change from personal to vicarious liability was the creation of a profession,—not Doctors of Laws, or even Bachelors of Law, but Champions in Law. These gentlemen were not



only paid witnesses. There is no discredit in that, as we recognize to-day in the employment of experts in civil and criminal cases. But the champions were not experts: they were professional witnesses who were hired to testify to matters false or true—it made no difference to them,—and, if their testimony was impeached, to defend it by mortal combat.

For three hundred years this practice prevailed, and trials were often decided upon the Napoleonic maxim that God is on the side of the heaviest battalions.

Plaintiff or defendant produced a truculent bravo, who swore to the untruth, the whole untruth, and nothing else, while he glared upon the opposing party. Efforts were made to suppress this practice and to limit the effect of the testimony thus given. Edward I. of England, by the I. Statute of Westminster, required that in a suit involving title to real estate the witness must swear that he had been present when the alleged possession of the land was given, or that his father, when dying, had enjoined him by his filial duty to maintain his principal's title as if he had been present.

A professional champion was not accepted as a witness in causes in which he was not employed, and severe penalties were imposed in case he was vanquished in a judicial duel. In most cases he was hanged. In the least event, he lost a hand or foot. Signor Beaumanoir, who wrote a treatise on this subject in the latter part of the thirteenth century, states as a sufficient reason for these severe penalties, that they were intended to prevent the professional perjurers, who had been hired to give testimony in behalf of A., from being bought off by B., and purposely losing the fight. The prospect of death or mutilation was an incentive to do their best when it came to blows.

A woman condemned to death had the right of appeal to Wager of Battle, if she could obtain a champion who would imperil his life for her. Our readers will recall the splendidly dramatic episode in *Ivanhoe*, when Rebecca, accused of sorcery, had a few hours given her in which to find a champion, and sits at the foot of the stake whereat she is to be burned, while the weak and wounded knight is coming to her rescue.

This right of appeal from words to blows existed in Germany until the beginning of the sixteenth century, and in France until the middle part of that century, when it was abolished in consequence of a tragedy which is known to us—so strange are the curiosities of history—principally by the fact that the victor in the judicial duel won by a sword stroke which was thenceforth called "*le coup de Farnac*."

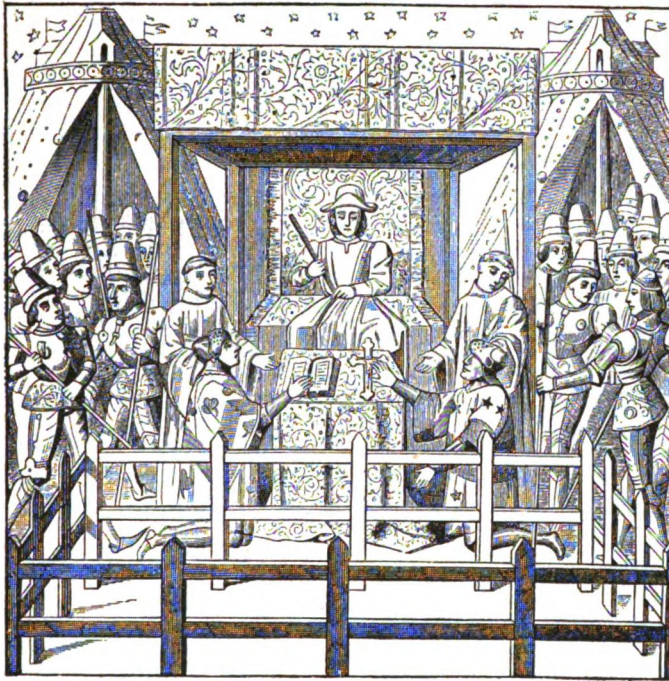
The combatants were two noblemen of high rank, and the duel was fought in the presence of Henry II. and a vast concourse of the nobility and the commonalty of France, at Saint Germain-en-Laye near Paris, July 10, 1547.

This duel is memorable, not only because it was the last case of Wager of Battle in France, but because the duellists were bosom friends, who were forced into the quarrel by the intrigues of two women, and by the mean and treacherous nature of the King, who presided at the combat, and whose father, Francis I., had refused to permit it. Some preliminary account is necessary to explain the matter.

In the last years of the reign of Francis I. two ladies of the court had supreme influence. One was the Duchesse d'Estampes, who was strict in her notions of propriety, as the times were; the other was Diane de Poitiers, who was the mistress of the Dauphin Henry, who afterwards became King Henry II. These ladies were rivals, and their

hatred of each other was so well known that the court of France was composed of two hostile camps, and the noblemen were partisans of one or the other of the ladies. Among the courtiers who were the adherents of the Duchesse, Guy Chabot, Seigneur de Jarnac, was conspicuous. His family was one of the most illustrious in France, and he had married the sister of the Duchesse

distinction in the household and court of Francis; and they were both renowned for skill in the use of weapons. But in this Chasteigneraye had several advantages over de Jarnac. He was ten years younger than his friend, he was taller, heavier, and had great skill in the rough and tumble fight which the law of duelling in France then permitted. In the frequent duels which he



"HOW THE PLAINTIFF AND THE DEFENDANT TAKE THE FINAL OATH BEFORE THE JUDGE."

From "*Cérémonies des Gages de Bataille*," a manuscript of the Fifteenth Century.

d'Estampes. He was handsome and extravagant, particularly in his attire, and he also was addicted to love affairs, about which he was so indiscreet as to talk to his boon companions, and among them his friend de Vivonne, known by the name of one of his estates as La Chasteigneraye, as Chabot was by his estate of Jarnac. Both of these gentlemen had rendered gallant service in war, and both had filled places of

had fought, he constantly endeavored to bring them to the issue of what was called "body to body," in which his height and strength gave him great advantage. Mortal combats admitted of these struggles, in which offensive weapons became almost useless; for protected by the hauberk, which covered the breast, nothing was easier than for the stronger of the two to rush in upon his antagonist and close with

him. If the latter broke ground, retreated to the barrier, and was thrown outside the lists, he was declared vanquished; if he met the shock, the assailant always attempted to seize the sword-arm; and, when by dint of superior strength, one was thrown on the ground, the *coup de grace* was generally given through the openings in the armor, with the dagger that was carried in the right boot. This gladiatorial wrestling was frequently of the most repulsive character; as in a duel which took place at Sedan, where the Baron d'Hoguerre having got his adversary, the Sire de Fendilles, under him, and having succeeded in tearing off his helmet, beat him over the face with it, inflicting very severe wounds, and then tried to gouge him and to choke him by filling his mouth with sand,—which compelled Fendilles to cry for mercy, and own himself vanquished.

One day, in familiar conversation at Compeigne, in the presence of the Dauphin, Vivonne observed to Jarnac: "I can't make it out, Guichot, how you manage to dress so magnificently with your means, for I know they are not very large."

Jarnac replied that his step-mother, a young and beautiful woman, whom his father had lately married, was very kind to him; and that as her husband refused her nothing, he took care to be very attentive to her, obtaining by so doing as much money as he wanted. This answer was innocent enough; but the Dauphin talked it over with Diane, who, finding it a good opportunity for slandering the brother-in-law of Madame d'Estampes, reported that Jarnac had publicly boasted that he had been guilty of incest with his step-mother, and Prince Henry, when appealed to, did not contradict the rumor.

When Jarnac heard this story, he was, naturally, wild with rage, and felt certain that the Dauphin was the author of the

scandal; but him it was impossible to reach. Therefore, he publicly declared that whoever had made the assertion, or who would maintain it to be true, was a scoundrel and a villainous liar. Prince Henry was known to be the author of the calumny, and the manner of the courtiers toward him showed they understood it to be so; but as he had neither the courage to maintain his words, nor the manliness to retract them, his position and that of his mistress Diane was becoming extremely uncomfortable, when Vivonne, to please her and to win favor from the prince, and thinking possibly that Jarnac would scarcely dare to risk almost certain death in a duel with so dangerous a person as himself, and ignoring all the intimate friendship which had existed for years, proclaimed that he was ready to take up the quarrel, and that it was really in a conversation with him that Guichot had boasted of his guilty intimacy with his step-mother, which he now denied. Jarnac appealed to Francis I. to afford him the right of a judicial duel to establish his honor and integrity; but Francis I., who was very fond of both the young men, was reluctant to have the two friends meet in mortal combat. He submitted it to his privy council, who were divided in opinion, and the King finally refused it, stating "that a prince ought never to permit that to take place out of which no good could be expected to arise, as in a combat like this." As soon, however, as Francis died and Henry II. ascended the throne, Vivonne renewed the appeal. His letter was as follows:—

"To the King, my Sovereign Master. Sire: Having learned that Guichot Chabot, being at Compeigne during the reign of the late King, had said that whoever accused him of having boasted of a criminal intimacy with his step-mother was wicked and vile; to that, Sire, with your good will and

pleasure, I reply that he has wickedly lied, for he made the boast to me several times.

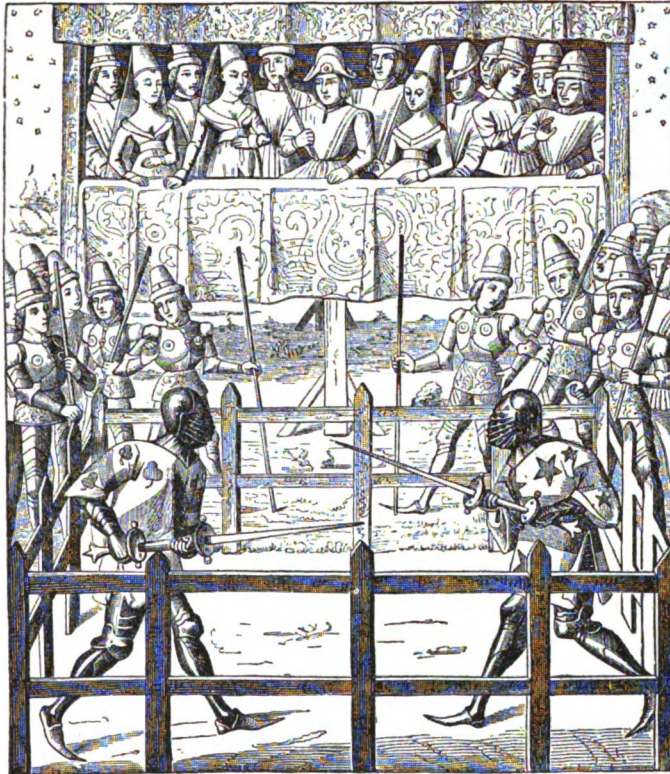
"FRANCOIS DE VIVONNE."

A few days after writing this letter, Vivonne despatched a second, in which he said:—

"Sire: I beseech you very humbly to

himself, and doubtless believing that Vivonne would prove an easy victor over Guichot, was willing that the combat should take place.

As soon as Jarnac became aware of the request preferred by Vivonne, he also wrote to the king, giving the lie to the charge



"HOW BOTH PARTIES ARE OUT OF THEIR TENTS, ARMED AND READY TO DO THEIR DUTY AT THE SIGNAL FROM THE MARSHAL, WHO HAS THROWN THE GLOVE."

*From "Cérémonies des Gages de Bataille," a manuscript of the Fifteenth Century.*

grant me the privilege of mortal combat, wherein I will prove, by force of arms on the said Guichot Chabot, what I have said and what I maintain, in order that by my hands may be verified the whole offense which he has committed against God, his father, and justice."

Henry, being desirous of putting an end to the affair which was so disgraceful to

against him, and begging that the combat might be granted. He moreover urged the bishop of Beziers, who was a favorite with the King, to support the prayer of his petition. The result of these letters, after various forms had been gone through, was favorable to the desires of both parties; and letters-patent were issued bearing the royal sign-manual, which Bretagne, herald-at-

arms, delivered to Jarnac, on the 13th of June, 1547, at his dwelling in the Rue St. Honoré; he at the same time presented a new challenge from Vivonne, in which, after repeating in the grossest terms the injurious accusations he had originally made, he demanded that a list of the necessary arms and weapons should be sent to him within four days from the date of his letter, at the hôtel de Tournelles, in Paris.

Jarnac lost no time in complying with the demand of Vivonne, and immediately despatched Angouleme, herald-at-arms, with a paper, as follows:—

“Francois de Vivonne, provide yourself with the arms in which you are to appear on the day appointed for the combat. In the first place, you must be provided with a courser, a Turkish horse, a genet and a cropped horse. *Item.* You will provide yourself, as armor for your courser, with a war-saddle, a tilting-saddle, and a saddle two fingers high, the saddle-bow low in front, but having two cushions behind, and also with a saddle which shall have no cantle behind. *Item.* The said horses are to be supplied with the said saddles, the genet having in addition a saddle with short stirrups, and the Turkish horse, a Turkish as well as a French saddle, with a cantle two inches high, and the saddle-bow low in front. *Item.* The cropped horse is, moreover, to have a French saddle, and a saddle without either cantle or cushion, but the saddle-bow protected by a half thigh piece. *Item.* The said horses are to be armed with barbs of steel before and behind, with forehead, flank and croup-pieces of iron. *Item.* That the said four horses are to be armed at all points with steel and leather barbs, mailed caparisons, and plated reins, the same as when prepared for battle, with the jousting weapons conformable. *Item.* You are to be provided to arm yourself with all

the pieces necessary for a man-at-arms, with single and double pieces for jousting or otherwise. *Item.* You are to provide yourself with a complete suit of light armor. *Item.* You are to provide yourself with every kind of mail armor that can be worn. *Item.* With a shield and head piece. *Item.* With a target à l'albanaise, and bucklers and targets of every kind, that are used on horseback or on foot. *Item.* With all kinds of gauntlets, of iron, mail, or steel plates. *Item.* You are to provide yourself and your horses with arms and armor of every possible kind that can be employed in war, in jousting, in ordinary and in mortal contest. Moreover, such arms as are not included in the preceding, I will bring both for you and for me, reserving to myself always, the right of adding to or taking from them, of moving or removing within the lists, or stripping myself to my shirt, or more or less, according as it shall seem good to me.

“Done at Paris, this sixteenth day of June, one thousand five hundred and forty-seven.  
GUY CHABOT.”

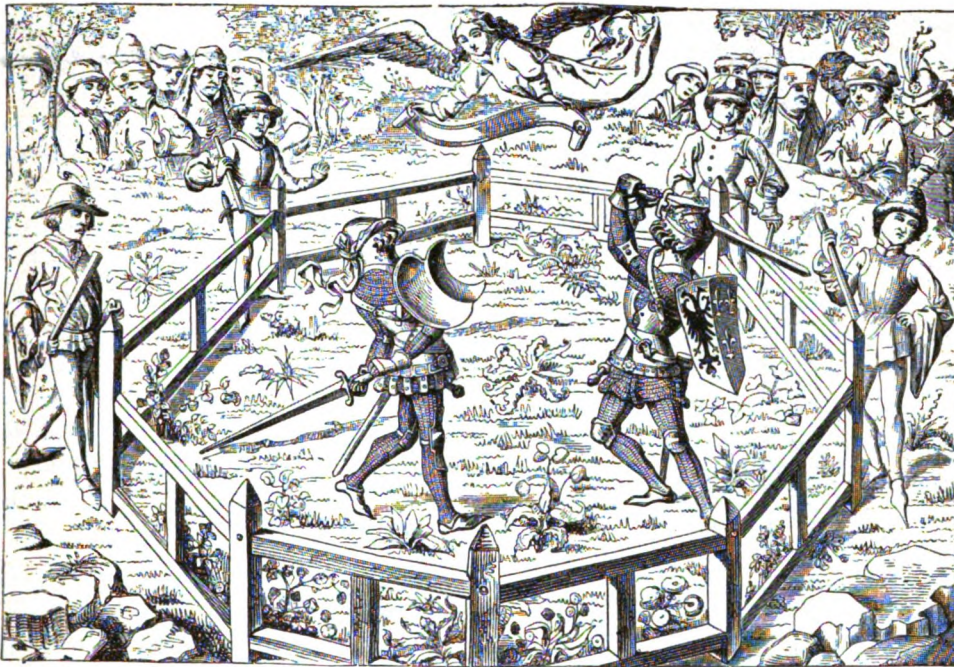
Angouleme, intrusted with the delivery of these conditions, performed his errand in due form, drawing up, as was customary, a formal report of the manner in which he had executed it, and stating that Vivonne had accepted the articles proposed. He added that, when he had read them, La Chasteigneraye merely observed: “Jarnac wants to fight with my purse as well as my body!” But the King, whose champion he really was, supplied him with money, and La Chasteigneraye, who had resolved to make the most of this opportunity, and having the King as his banker, made a most extravagant display. For a month or more before the duel he never appeared in public except with a company of upwards of a hundred friends, all of whom wore his colors, and his expenses, says Veilleville, were



so great that no prince at the court could equal them, for they amounted to more than twelve hundred crowns a day. Jarnac was more prudent; instead of making a public display, he kept himself secluded, and took lessons of Captain Cassi, an experienced master of the *duello*. It was by his counsel that, at the last moment, Jarnac obliged Vivonne to put on his left or shield

prince of the blood, to appear on the side of Jarnac, and M. de Boisy, the grand-equerri, was selected in his place; he had, in addition as seconds, four other gentlemen of the court. The principal second of Vivonne was the Comte d'Aumale; and he had likewise four others.

The confidence of Vivonne was excessive. He is described by Carloix, the sec-



SINGLE COMBAT TO BE DECIDED BY THE JUDGMENT OF GOD.

*From a manuscript of the Fifteenth Century.*

arm an arm-piece, which quite prevented him from bending it. Vivonne, having been wounded in the right arm, and still suffering from the effect, was thus deprived of the power of wrestling with Jarnac and throwing him.

The day for the duel was fixed for the tenth of July, 1547. The first thing to be done was for each combatant to choose his seconds, then called godfathers. The King would not permit M. de Vendome, the first

retary of the Marshal de Veilleville, as "fearing his enemy no more than a lion fears a dog."

A few days before the duel the King and all the court removed to Saint-Germain-en-Laye, where he had ordered that it should take place. The Constable de Montmorency issued all the necessary orders, and selected the place of combat, — a meadow on the eastern side of the chateau. The extent of the lists was carefully regulated;

galleries were raised parallel to the principal front of the barriers; the tents of the combatants were placed right and left of the pavilion occupied by the King; the canopies of the *poursuivants-at-arms* were at the four corners. It was found necessary to have present a large body of soldiers, to prevent the crowd from forcing their way into the reserved enclosure, for an immense multitude came from Paris to witness the combat.

It is not known whether Catherine de Medicis was present; but the King's sister, his aunt Marguerite de Valois, all the princesses, Diane, and most of the ladies of the court, and all the principal nobles of France were there. Out of all this host of courtiers there was scarcely one who did not believe that Vivonne would gain an easy victory.

The presence of the King and the court invested the scene with unusual dignity, and nothing was neglected by the Constable to give every possible effect to the ceremonial according to the rules prescribed by antique legislation.

At sunrise on the tenth of July, 1547, Guienne, the herald-at-arms, made the following proclamation at each extremity of the lists: —

"This day, tenth of the present month of July, the King, our Sovereign Lord, has permitted and granted the free and safe field, for mortal combat, to Francois de Vivonne and the Sieur de Monlieu, defendant and assailant, to put an end by arms, to the quarrel of honor which is between them in question; for which cause I make known to all, on the part of the King, that none are allowed to prevent the effect of the present combat, nor to assist in it, nor to annoy either of the combatants on pain of death."

The lists were double, the empty space between the first and second barriers being

occupied by the soldiers of the Constable and the Royal Guards. At each end of the field was a door of entrance for the combatants, and another door opened beneath the gallery of the Constable, to the right of which were placed four of the provost's sergeants and the principal executioner, with a bundle of cords, foreshadowing the disgraceful penalties which the law allowed to be visited on the corpse of the vanquished. Beneath the seat of the judge of the field was a table covered with cloth of gold, supporting a missal and a crucifix; while a priest stood silently on one side.

Immediately after the herald had finished his proclamation, Vivonne left his hotel, accompanied by his seconds and his friends to the number of more than five hundred, dressed in his colors, which were of white and carnation. His shield and sword were carried before him, and in advance of these a banner, bearing the image of St. Francis, his patron; the cortege was also preceded by musicians with tambourines and trumpets playing lively airs. The procession made the circuit of the lists; then the shield of Vivonne was attached to a pillar on the right of the royal gallery. Received at the inner barrier by the Constable, Vivonne was conducted to the tent on the right hand, to wait there till it was time for him to enter the field.

The same ceremonial attended the arrival of Jarnac. He was accompanied by his seconds and a hundred and twenty gentlemen, wearing his livery of black and white. Before him was carried a banner, with the image of the Holy Virgin. Jarnac, like Vivonne, was entirely armed, with the exception of his helmet, which was carried by his squires, the bearers also of his sword and shield.

The combatants went to their tents while their seconds proceeded to examine the

arms and armor for the duel, and to argue about various points. Some two hours were spent in this conference, for Jarnac in spite of all the elaborate demands he had made for horses and their equipment, announced through his seconds that the duel should be on foot and in plain armor, and that Vivonne should wear the arm-piece we have mentioned. At ten o'clock the duel-

or eye, that can aid, harm, or prejudice either of the combatants. And, further, by the express command of the King, I forbid all persons, of whatsoever quality or degree, to enter the field during the combat, or to afford any kind of assistance to one or the other, on any excuse or necessity whatsoever, without permission of the Constable and Marshals of France, on pain of death."



THE JUDICIAL DUEL. THE PLAINTIFF OPENING HIS CASE  
BEFORE THE JUDGE.

*From "Cérémonies des Gages de Batailles," a manuscript of the Fifteenth Century.*

lists were prepared for the contest, and a herald advanced to the centre of the lists and made the following proclamation : —

"Hearye! Hearye! Hearye! Lords, knights, and squires, and persons of every degree! On the part of the King, I issue an express command, that, as soon as the combatants shall have begun to fight, all present shall keep silence, and neither speak, cough, spit, nor make any sign of foot, hand,

Vivonne then marched around the lists, preceded by a band of music, and followed by a number of his friends. Jarnac made a similar procession, and then each of the combatants knelt down before the King's gallery on a velvet cushion ornamented with gold. A priest then asked them to think upon the solemnity of the quarrel before them, and that each should feel confident of the justice of his cause before engaging in



mortal combat. After which, each took oath upon the Bible, presented to him by the Constable, that his cause was just, and that he did not bear about him any words, charms or incantations by which he hoped to injure his enemy, but that he relied only on God, his bodily strength, and his right in the contest.

Having taken this oath, they proceeded to their respective chairs placed at opposite ends of the lists, and their weapons were given them, a sword and two daggers. Then the seconds withdrew, and the royal herald-at-arms proceeded to the middle of the lists and proclaimed three times: "*Laisser aller les bons combattants!*"

Vivonne and Jarnac then arose from their chairs and advanced, Vivonne with his sword raised and with hasty steps; Jarnac, slowly, with his shield against his breast and his sword raised, apparently to guard his head. Vivonne struck a furious blow; but Jarnac, making a side step, received it on his shield, and springing behind his adversary, made a sword cut which caught Vivonne on the left leg between his breeches of mail and the upper part of his boot. The blood gushed out and Vivonne staggered, while the spectators uttered a stifled cry at the unusual blow. Vivonne rushed towards Jarnac with the evident intention of closing with him, but again the latter sprang to one side and dealt a second stroke on the left leg. Vivonne's sword dropped from his hand and he fell to the ground, ham-strung, helpless, overcome by the secret stroke which Jarnac had learned from Captain Cassi.

When Vivonne fell, a tumult broke out throughout the whole assemblage. His friends shouted out imprecations, while those of Jarnac shouted in exultation. Some minutes elapsed before order was restored, and in the meanwhile Jarnac stood gazing

upon his former friend who now lay at his mercy, and whom it was his duty to kill and deliver his body to the executioner to be treated as that of a perjurer.

When silence was restored, he called to Vivonne: "Restore my honor, and ask pardon of God and the King for the offense you have committed!" Vivonne's only answer was an attempt to rise and continue the fight.

Jarnac, leaving him where he lay, advanced to the royal gallery, raised his visor, and bending on one knee, addressed the King.

"Sire," said he, "I beseech you to let me be so happy as to know that I am a man of worth; I give Vivonne to you; take him, Sire, and let my honor be restored to me. It is our youth alone that has been the cause of this; let nothing be imputed to him or his on account of his fault, for Sire, I give him freely to you!"

To this the King made no answer. Jarnac then approached Vivonne, and conjured him to yield. The answer was an attempt to rise on one knee, and an effort to use his dagger.

"Stir not, or I slay you!" cried Jarnac.

"Kill me, then!" replied Vivonne, and he fell back exhausted, torrents of blood welling freshly from his wound.

Again Jarnac turned towards the King, and with clasped hands entreated Henry to show him grace; but, as before, the King was inflexible. Jarnac once more advanced to where Vivonne lay, and said: "Chasteigneraye, my old companion, recognize thy Creator, and let us be friends! Sire," he added to the King, in a voice broken with emotion, "for the love of God, take him."

The Constable and the marshals, in their turn, interceded with Henry.

"If the King does not interfere," they said, "Jarnac will be compelled to kill him, and then drag forth his body, to give it into the

hands of the hangman." But the man who wore the crown of France, and for whose sake Vivonne had imperilled his life, betrayed no emotion and gave no sign of assent to their petition.

Jarnac then made a last appeal to Marguerite of France, the King's sister, imploring her to obtain from the King the life of Vivonne, which could only be done by his being taken into the royal charge, since his defeat in the judicial duel was a conviction of perjury. Her appeal was successful, and the King at last said :

in ejectment was brought in the Court of Common Pleas by one Lowe, against Kyme and others who held the land in question. The defendants demanded the Wager of Battle, and each side produced a champion. The Court accepted the champions and fixed a day for the duel. Thorne, defendant's champion, then threw down his glove, which Naylor, for the plaintiff, took up. The champions were then sworn to do battle at Tuthill Fields in Westminster. On the appointed day an arena had been prepared, sixty feet square, on level ground. It was



THE JUDICIAL DUEL. COMBAT OF A KNIGHT WITH A DOG.

*From a manuscript of the Thirteenth Century.*

"Jarnac, do you give him to me?"

"Gladly, Sire, do I give him. For the love of God, and for your own sake. Am I not a man of honor?"

"You have done your duty, Jarnac," was the reply; "and your honor is restored to you. Take away the Seigneur de la Chasteigneraye!" He had no other message for his champion. Vivonne was borne from the field, but on learning what had taken place he tore the bandages from his wound and died in a few hours.

In England, the judicial duel, although legalized by William the Conqueror, was scarcely ever resorted to. In 1571, a suit

surrounded by a palisade; on the west side was erected a platform for the judges, and their judicial chairs were brought from the court room in Westminster Hall for them to sit in. Before them was a bench for the Sergeants-at-Law. On the other sides of the arena tiers of seats were erected for the spectators. At opposite ends of the enclosure a tent was pitched for the use of each champion and a knight waited in each, to act as second or Master of Ceremonies for him. At nine o'clock, the three judges, clad in their scarlet robes of office, and attended by the court officials and the learned Sergeants-at-Law, appeared and formally opened

court. Some four thousand spectators occupied the seats,—women and children under fourteen were excluded. The champions were then brought from their tents, the one for defendant, who had prayed for Wager of Battle, having priority. Each was attired in a coat of armor reaching from shoulder to knee. He was bare-headed, bare-armed and bare-legged below the knee; on his feet were red sandals. Each champion was preceded by a drummer and trumpeter, and each was attended by two yeomen, one of whom carried his leather shield and the other his staff or club an ell long. Before Naylor was also borne, on the point of a sword, the gauntlet of challenge which he had taken up.

Proclamation was made enjoining strict silence on the spectators. Each champion in turn knelt before the judges and made obeisance. Then he went to the centre of the lists and did the same. They then again knelt before the judges, who ordered Naylor to stand on the left side of their bench, and Thorne on the right side. Each took his shield and club and went to his station. The further procedure was ordained as follows:—The champions should again come before the judges, and, after shaking hands, each should take oath upon the Bible. For the defendant, that the land in dispute did not belong to the plaintiff. For the plaintiff, that it did. Each champion then should swear as follows; "Hear ye this oath, Justices. I have this day neither ate, drank, nor have I upon me bone, stone nor any enchantment, sorcery, or witchcraft, whereby the law of God may be abased or the law of the Evil One exalted." The fight once begun, must continue till the stars appeared in the evening. If defendant's champion could hold out till then his principal would be victor, because he had maintained his possession of the land. If he was killed, knocked insen-

sible, or uttered the word "craven," which was equivalent to a confession of perjury, he was beaten, and judgment was given against his principal, and the "craven" was thereafter incapacitated from being juror or witness in any cause.

Alas for the judges, learned sergeants and the four thousand spectators, who had journeyed to Tuthill Fields in the expectation of seeing a fight, the principal parties had privately settled the matter, and, on being called—their presence being necessary to authorize the combat—they did not appear, and so the assembly departed without learning whether Naylor or Thorne was the "better man."

From that time the plea of Wager of Battle seems to have been unused in England until in 1817 it was revived in a startling way. On May twenty-sixth in that year, a pretty girl named Mary Ashford went to a dance at a village inn in Warwickshire. She there met a farmer's son named Abraham Thornton, with whom she danced several times. At a late hour she left the inn to go to her grandfather's house. Thornton acted as her escort. Next morning her body was found in a pool of water, and there was proof that she had been outraged and then murdered. Thornton was tried for the crime, and the circumstantial evidence was very strong against him, but he succeeded in proving an alibi, and was acquitted. Nevertheless, the public feeling against him was very bitter, and Mary's brother William resorted to an unusual and almost obsolete legal remedy, called the "appeal of murder," which was a relic of an old system of procedure wherein after an acquittal on a charge of murder a new trial could be demanded by an heir or blood relation of the murdered person. Such an appeal was in direct violation of the fundamental rule of the English law, that no one

should twice be put in jeopardy for the same crime, but it had not been abolished by statute, and, as it was shown, neither had the defense to it. Thornton was re-arrested and brought before the Court of King's Bench in November, 1817.

When he was called on to plead, his counsel produced from his bag instead of papers, a pair of leather gloves, one of which the prisoner put on his left hand, the other he threw on the floor; and then holding up his gloved hand he said; "I am not guilty, and am ready to defend the same with my body." Lord Ellenborough and his associate judges were completely taken aback. The prisoner's plea was Wager of Battle which had been unused for two hundred years. Ashford's counsel appealed to the Court, saying that he was completely taken by surprise; that their Lordships could see that Ashford, who was young and weak, would have no chance against Thornton who was older and far stronger; and that it would be a mockery of justice, if a man accused of murdering a girl could

clear himself by murdering her brother. To this it was answered, that the appeal of murder on which the prisoner was brought into court, was also a relic of barbarism, and that if the prosecutors had examined the old laws, they would have learned that on such an appeal Wager of Battle was a permissible plea. Ashford tried to pick up the glove and accept the duel, but was prevented, and the trial was adjourned pending argument on the law. This was had, and, in April, 1818, the Court unanimously sustained the plea, Lord Ellenborough saying, "The law of the land is in favor of Wager of Battle, and it is our duty to pronounce the law as it is, and not as we may wish it to be. Whatever prejudice, therefore, may justly exist against this mode of trial, still as it is the law of the land, the Court must pronounce judgment for it."

Ashford's counsel would not allow him to accept the challenge, and Thornton was discharged. At the next session of Parliament the appeal of murder and Wager of Battle were abolished.

## COULD SHOW IT IF NECESSARY.

By JONAS JUTTON.

**H**ENRY JAMES will suffice for the pseudonym of a young West Tennessee lawyer, who, one day soon after he was admitted to the bar, was assisting in the prosecution of a man charged with murder. The young lawyer was very enthusiastic and aggressive, and brought all of his legal lore to bear to send the prisoner to the pen or to the gallows. He made a stirring speech showing conclusively that the prisoner had killed somebody, but never gave the least proof that some one had been killed. When

his speech was about finished the judge interrupted him with:

"Mr. James, have you shown the *corpus delicti* in this case?"

The attorney turned quickly and proudly toward the judge and exclaimed:

"If I have n't, your honor, I have it here on the table amongst my papers!"

The judge smiled, others chuckled, and after the Court had made a little explanation, James proved who it was that had been slaughtered against his will.

# "IN THE MATTER OF REST."

BY GRANVILLE I. CHITTENDEN.

PROFESSOR MAX MÜLLER very aptly described dictionaries as "the grave of language."

The lifeless, concise, and seriated statements of legal digests in like manner remind one of a dreary highway leading through a desert whose many guide posts point usually with exact, but often with ambiguous fingers to by-ways, equally cheerless. Whatever literary beauties the decisions of the courts may possess are obliterated by the merciless blue pencil of the compiler.

It is, therefore, a novel experience to find among the multitude of compilers one who for a moment pauses in his spiritless routine and in due form inserts in his digest a bit of poetry as delightfully refreshing to the intellect of the weary searcher after legal principles as is a beautiful oasis to the eyes of the followers of a caravan. The State of Georgia enjoys the unique honor of possessing this able compiler.

In 1879 the Honorable Logan E. Bleckley after years of eminent service as Associate Justice of the Supreme Court of that State resigned, and at the conclusion of his last opinion rendered this exquisite poetic gem :

## "IN THE MATTER OF REST."

### I

"Rest for hand and brow and breast,  
For fingers, heart and brain !  
Rest and peace ! a long release  
From labor and from pain :  
Pain of doubt, fatigue, despair —  
Pain of darkness everywhere.  
And seeking light in vain !

### 2

Peace and rest ! Are they the best  
For mortals here below ?  
Is soft repose from work and woes  
A bliss for men to know ?  
Bliss of time is bliss of toil :  
No bliss but this, from sun and soil,  
Does God permit to grow."

By the order of the Court these verses were then entered upon its record.

The sentiments there expressed brought comfort to the heart of the Honorable Dawson A. Walker, also a member of that court, who carefully transcribed the poem from the court records and embodied it with great praise in a paper prepared by him while in failing health a short time before his death. This incident was touchingly referred to in the memorial on the life of Judge Walker, and the poem for a second time thus found its way into the archives of that tribunal.

After enjoying eight years of rest Judge Bleckley was appointed in 1887 by the Governor of Georgia, Chief Justice of the Supreme Court to fill the vacancy caused by the death of the Honorable James Jackson. The appointment was ratified at the ensuing election and Judge Bleckley filled the position to the highest satisfaction of the people until 1894, when he again resigned, and finally ended a term of public service distinguished alike for its probity, profound legal knowledge and accomplished scholarship.

Howard Van Epps in his digest of the Georgia Reports has published this poem under its title and in its proper alphabetical order.

## REMINISCENCES OF THE MAFASSAL LAW COURTS OF BENGAL.

BY ANDREW T. SIBBALD.

THE word "Mafassal," sometimes written "Mofussil," and in various other ways, is most intelligibly translated by the word "provincial." For several years after the English had assumed responsibility for the administration of the law in India, the old Mussulman names of "Amin," "Sadrá-la," "Nizámat Adálat," "Diwáni Adálat," "Sadar Nizámat Adálat," and "Sadar Diwáni Adálat," were retained until the Acts of the Indian Council reconstructed the courts, which are now known by the names of High Courts, District and Sessions Courts, Small Cause Courts, Subordinate Judge's, Munsiff's, District Magistrate's, Joint Magistrate's, Assistant Magistrate's, and Honorary Magistrate's. The High Court is not "Mafassal," except so far as it is the Supreme Court of Appeal in Bengal; and the other tribunals have distributed amongst them all, and more than all, the judicial work, both civil and criminal. It is not my purpose to give a full account of these courts, with their large staff of subordinate officials, and all the minute details of their procedure. It will be sufficient to mention that one judge unites the civil jurisdiction of a District Court and the criminal jurisdiction of a Sessions Court, whilst under him are the Civil Courts of Subordinate Judges and Munsiffs, and the Criminal Courts of the various magistrates I have already named. This enumeration is not exhaustive, as there are other courts in non-regulation provinces, and in odd corners, so to speak, of the Empire; but they may be considered as quite exceptional, and need no other mention in a description so concise as this must be.

The District and Sessions Judge is, with

but one or two exceptions, a European. He has an original civil jurisdiction, broadly speaking, unlimited, with a supervision and appellate powers over the Subordinate Judge and Munsiff; and he has a like unlimited jurisdiction in criminal cases — except that he cannot hang a European — with similar powers of supervision and appeal over the magistrates. He is always a covenanted civilian, who has gone through the grades of assistant and joint magistrates, at which latter stage he has had to choose between a judicial or an executive career, the two bifurcating into one, a District and Sessions Judge, the other, a Collector and District Magistrate.

As a counterpart of the barristers and solicitors of the American courts, there are advocates, pleaders, and "Muktars." The advocate, who is always a barrister, is known to the mass of the natives by the appellation of "ballister sáhib," or "counsly sáhib." He is a very important man in the eyes of his client. The climate precludes the possibility of his impressing the public by that factitious addition to his dignity, a wig; and in many parts of the "Mafassal" the gown and bands are dispensed with. In fact, it has been within my experience that these sedate and learned gentlemen have so far forgotten both the dignity of the court and the profession as to appear in a jaunty, light, lounging coat, or even in the brilliant stripes and white flannel of a lawn tennis suit. But, in spite of these disadvantages, he is considered a necessity, in all big cases, or where the litigant, anxious about the result of his case, is not too penurious or avaricious to pay his price. He is supposed to have, in

an especial manner, the ear of the Bench, both *in* court, and sometimes, I regret to say, *out* of it. By a delusion, which is still common enough amongst the natives, he is believed to have opportunities of putting in a word for his client at odd, and what I may call, uncanonical moments. He is credited with being on those easy terms with the European dispensers of the law, that during a comfortable chat over a cheroot at the billiard table, or at the convenient intervals that may occur between the games of lawn tennis or racquets, without any breach of propriety, he may metaphorically "buttonhole" them or give the conversation a turn upon the merits of his case; though, for the sake of appearances, the whole matter is afterwards formally argued through, as if the court had never heard anything at all about it. Of course, if there be an advocate on both sides, the power may be partially or wholly neutralized.

By some unenlightened clients who suppose that "every door is barred with gold, and opens but to golden keys," he is credited with more effective power; or, to put it in a more vulgar form, he is able to "grease the wheels of justice" with a little "palm oil." It may be considered impertinent to remark even that the practices suggested exist merely in the minds of the grossly ignorant, but, nevertheless, it is a fact that the idea is a possibility, if not more, in the minds of many whose limited experience of life has taught them that everyone has his price. Besides those fictitious claims upon the public confidence, he is more justly considered to have the ear of the judge in court—sometimes from his superior abilities and education, sometimes from his European pluck and energy, sometimes from his better social position, or sometimes from all combined. It may be that when the magistrate is considered weak, and the advo-

cate is one with a talent for bullying, there is a demand for his services; but this has, to a certain extent, reacted, and with some very young civilian magistrates there is a tendency to be prejudiced against the party that retain an advocate. The pleader combines the work of both barrister and solicitor. He is mostly a native, often a Bengali, and generally a smart, able practitioner. They are to be met almost in crowds at every local bar where there is work to be had. They are keen and often successful competitors with advocates in the struggle for clients, having the advantages of a more familiar acquaintance with the native languages, which are the languages of the courts—where there are no interpreters—and being free to do work which by etiquette or procedure is not done by the members of the higher branch. They mostly speak English well and fluently, having been perhaps well educated at the Calcutta University, from which many have obtained degrees; and, where successful in their profession, acquire a social status and a respect from both their fellow-countrymen and Europeans that very few native advocates in the "Mafassal" ever obtain. There may be a sort of clique amongst them, more understood than expressed, perhaps, when the first European advocate or pleader appears on the scene; but these native gentlemen are particularly approachable and courteous, and ever ready to be friendly to anyone who is a gentleman and will take the little trouble to be courteous to them. All the same, it is not an easy thing for a European, whether advocate or pleader, to establish a connection in the "Mafassal." The competitors are too many and the competition too keen for that, even where an ignorance of the language is not an additional obstacle. The "Muktar,"—pronounced "Mooktar,"—or law agent, is quite peculiar to the genius of

the country. He has no counterpart in America, but he bears some resemblance to the old pettifogging and ignorant attorney with a few common points of practice at his fingers' ends—a race now extinct. He is the first recourse of the litigant who wants advice cheaply. Both the certificated "Muktar" and the empiric prowl about the purlieus of the courts in swarms, grabbing at every client that has any kind of law-business in hand. Then a traditional and stereotyped mode of helping a client, and, as they think, improving his case, is by suppressing some facts and adding others.

Every witness, before he is allowed to go into court, is well drilled and taught, and has practised his evidence before them till he is believed to be tolerably safe. Unfortunately the necessity of improving their case—more especially perhaps, when it happens to be a very simple one—is so thoroughly rooted in the imaginations and habits of native litigants, that the "Muktar" would stand little chance of getting on in his profession if he neglected or was above this mischievous trick; and the idea of winning a case by telling the simple, unvarnished truth has yet to be realized by the public. The consequence is that a magistrate has sometimes to decide in favor of a litigant who, with every one of his witnesses, has perjured himself. Some magistrates say that they can readily detect when a witness is speaking untruth, but though I believe this to be to a great extent true, it helps little to the arriving at a just decision, to the unmasking of the whole deceit, or the discovery of the true state of facts. The "Muktar" often conducts the case himself in the magistrate's courts. His chief aim there is to impress the client with his energy and zeal; and consequently every technical objection, however microscopic, is raised, and the patience of the magistrate is frequently strained be-

yond judicial endurance. In cross-examination his efforts are chiefly directed to making the witness contradict himself—which, as I have already observed, is not always of much importance in influencing the decision of the Bench—and it generally ends, after many irrelevant questions, by his being summarily told to stop and sit down.

In most cases the "Muktar" chooses the advocate or pleader for his client, and he is not always above doing a little smart practice for himself at that time. He will sometimes, when his client is not able to look after him, pretend to have retained a junior pleader on a much smaller fee, pocketing the difference himself. Or he will, having retained the advocate at a fixed fee, debit his confiding client with just double the amount, so that he gets sometimes a good "haul" out of the case. In many instances, though, he is wretchedly paid, taking just what he can get. Nor do I mean to imply that there may not be some very honorable exceptions among the class. He has often the sole conduct of the case in the preliminary stages, and, as often as not, the advocate or pleader finds his services have been called in when some hideous blunder has completely or almost destroyed the chances of success. He has, as a rule, the first word with the client, and has the general conduct of the legal business, whether contentious or not, of certain regular clients, for whom he also registers documents, and gives all the information he can at the various stages of progress through which the business goes. He is, in short, the legal agent or servant of those wealthy natives, of whom it may be literally said that the business of their lives is the endless litigation they have in the courts, men who are never free from light contention of some sort. Sometimes where he instructs advocates or pleaders he assumes a knowledge which he does not pos-



sess, and those gentlemen find, to their disgust, that what they relied upon as facts are mere fictions.

The interiors of the courts leave little to describe. The judge or magistrate sits on a dais with a table in front of him, while just beneath sit the advocates or pleaders. Behind them sit the "Muktars," and behind them stand the public, whilst the parties and witnesses are examined in much the same position as you find in most American courts. Some of the Magistrates courts, though, are simply execrable. The advocates or pleaders are elbowed and crushed by an odoriferous crowd pressing to the front, and a badly placed punkah gives its partial breeze to the Bench alone. Perhaps, too, the dais is very high, and it is only by an occasional stand on tiptoe by a moderately tall man that a view of the magisterial countenance can be obtained.

The court buildings are generally spacious single-storied blocks, with a verandah round the four sides. There is, however, no waiting room accomodation for the numerous pleaders and "Muktars," still less for the crowd of litigants. In most stations the pleaders have erected, at their own expense, a small bungalow, wherein they sit in one long room waiting for their cases to be called on. The room is open to the public, and the most important points of law, and business of the most vital interest to clients are discussed and settled here in the midst of a great noise and bustle. In some

places there is a very respectable law library, got up by private subscription; and advocates, whose bungalows are perhaps a little distance off, sit there waiting for their cases, or consulting with their clients. The "Muktars" squat under an erection of grass and thatch, which we should in America call a shed; whilst the unfortunate litigants, for whom primarily, partly at whose expense, all this wonderful system of law, these costly buildings and staff of officials are kept up, sit or stand anywhere, often in picturesque groups, in the verandahs, under the great "peepul" and "parca" trees, or in the blistering sun. At one time of the year there blows a hot wind from the west with all the force of a hurricane. Clouds of fine white dust rush along, covering everything and blinding everyone. Then the European shuts up his bungalow and lives the day in darkness, but the wretched witness and the still more wretched suitor or party in the cause has to sit, sheltering himself as best he can, day after day in attendance, and often for many days after the date fixed for his case to be tried.

The court hours are from 11 A.M. to 4 P.M., unless they are changed, as they sometimes are during the few hottest months, and then they are from 7 A.M. to 11 A.M. There is always a considerable crowd lingering round and about the various offices, long after the courts rise, but it gradually dwindles away, and by sunset the once busy scene has completely changed.



**PRIVILEGES OF THE PEERS.**

BY GEORGE H. WESTLEY.

THE trial of Earl Russell for bigamy revealed certain peculiarities of British law not commonly known, even amongst the Britishers themselves. These peculiarities relate to a function of the House of Lords. Centuries ago it was ruled that when a peer of the realm was charged with "treason, misprision or felony," he could demand to be tried by his peers, not in our broad democratic sense, where all men are equal, but literally by his brother peers, convened in the House of Lords. This ancient privilege had long fallen into disuse, when Earl Russell's solicitor bethought him to fetch it forth from the dust-bin of Time, so that his noble client might have a more dignified hearing, if not secure a more favorable judgment. The case was carried on with all the quaint Middle Age ceremonies.

The last previous trial of this sort took place in 1841, when Lord Cardigan was charged with "an assault with intent to murder, alleged to have been committed by him in fighting a duel with Mr. Harvey Garnett Phipps Tuckett." At the opening of the Victorian reign duelling was quite common in England, and quarrels over the gaming table, petty wranglings about politics and what not, frequently resulted in "coffee and pistols for two." But the good Prince Consort strongly deprecated such deadly sport, and he took the steps necessary to making it a punishable offense. It was under the new laws Lord Cardigan fell when he shot Captain Tuckett; but as a peer he claimed the privilege of being tried by his peers and not by the common courts.

Such trials took place as a rule in Westminster Hall, but owing to a disastrous fire, on this occasion it was held in the Painted

Chamber. Opening the proceedings the Royal Commission was read appointing Lord Denman to be Lord High Steward. Garter and Black Rod then advanced to his grace, and both holding the staff they knelt and presented it to him. At this the Lord High Steward rose and, after making a reverence to the throne, took his seat in a chair of state placed for him on the uppermost step but one. Lord Cardigan was then brought to the bar by Yeoman Usher, and having been arraigned in the usual manner, was allowed to sit uncovered and without his robes, on a stool placed within the bar. The case then proceeded as at an ordinary trial. Witnesses were examined and cross-examined, and then Sir Willam Follett, for the prisoner, raised the objection which wrecked the case, viz., a variance between the name of Tuckett as laid in the indictment and as proved by the evidence. The Lord High Steward ordered strangers to withdraw while their lordships discussed this point, and spectators, counsel, and prisoner were alike obliged to retire. On their readmission, and after the proclamation made for silence, the Lord High Steward, standing up, called every peer by his name from a list beginning with the junior baron; and each man, baron, viscount, earl, marquis, duke, and finally the Lord High Steward himself, standing up in his place uncovered, and laying his right hand upon his breast, answered, "Not guilty, upon my honor." The prisoner was then brought to the bar, and being informed of his acquittal, retired. Then proclamation was made for dissolving the commission, and the white staff being delivered by Black Rod to the Lord High Steward, his lordship stood up uncovered, and holding the staff in both hands snapped

it in two, and declared the commission to be dissolved.

Among the earlier cases noted by Burke is that of Lord Byron, granduncle and immediate predecessor of the famous poet, who was tried before the House of Lords for killing William Chaworth in a quarrel. Unlike Lord Cardigan the prisoner had no counsel to plead for him, counsel at that time not being permissible. Lord Byron was brought to the bar by the deputy governor of the Tower, who carried the axe before him and stood with it on the left hand of the prisoner, with the edge turned from him. Lord Byron, when he approached the bar, made three reverences and then fell on his knees at the bar where he remained until bidden to rise.

When the case had been fully heard the peers present declared the prisoner to be guilty of manslaughter, and he was called upon to say why judgment of manslaughter should not be pronounced upon him. "His lordship," says Burke, "immediately claimed the benefit of the 1 Edward VI, Cap. 12, a statute by which whenever a peer was convicted of any felony for which a commoner might have benefit of clergy, such peer on praying the benefit of that act, was always to be discharged without burning in the hand or penal consequence whatsoever. This singular privilege was supposed to be abrogated by the 7 and 8 George IV, Cap. 28, 5, 6, which abolished benefit of clergy, but some doubt arising on the subject, Lord Byron was allowed to go free on payment of his fees."

Another famous trial before the House of Lords was that of the Duchess of Kingston for bigamy, in 1776. She also made three reverences and fell upon her knees at the bar. She pleaded not guilty to the indictment, and formally demanded to be tried "by God and her peers," whereupon the clerk of the crown

said, "God send your ladyship a good deliverance." The judgment of the lords was that she was guilty, though one of them qualified his opinion by saying that she was guilty "erroneously but not intentionally." The duchess then prayed the benefit of the peerage according to the statutes, and after much argument this was granted. Her only punishment was a warning not to let such a thing occur again.

Philip, seventh earl of Pembroke, appeared for trial before the House of Lords twice, once for manslaughter, of which he was found guilty, but the punishment for which he escaped by claiming his privilege of peerage; and again for a brawl with a brother earl. For the latter he was condemned to confinement in his own castle "until further orders," and prohibited from sending any letter or message to the man with whom he had quarreled.

But this is not the only privilege which may be claimed by the peers of England. If any member of the House of Lords should ever find himself upon the scaffold he may demand to be hanged with a silken cord. The last peer to avail himself of this consoling advantage was Lord Ferrers, who was hanged at Tyburn in 1760 for the atrocious murder of his steward. This execution was one of the most remarkable judicial ceremonies ever witnessed in England. Lord Ferrers was a man of great conceit, even with the brand of Cain upon him. He was conveyed to the gallows, wearing his wedding clothes, in a landau drawn by six horses, escorted by parties of horse and foot. Behind came the hearse and six horses, for the purpose of taking his dead body from the place of execution to Surgeon's Hall, to be dissected.

His death agony was prolonged, to please his own vanity, for nearly three hours, for that was the time occupied by the procession to the gallows. "His lordship," says Burke,

"during the whole time appeared to be perfectly easy and composed." But it is said by another writer that he observed to the sheriff: "The apparatus of death and the passing through such crowds of people are ten times worse than death itself." He complained that the King had not granted his prayer to be allowed to die on the spot where his ancestor, the Earl of Essex, died in the time of Elizabeth, and thought it hard that he should have to die on the scaffold for the common felon. However, he eased his mind a little on this score by having the scaffold hung with black cloth and furnished with black cushions on which to kneel. He also provided a black sash for the pinioning of his arms. But any satisfaction he received from these trappings and parade was soon over,

and the body of the murderer earl dangled on the silken cord as if it were a piece of common rope.

Lord Sturton was another peer who demanded and was granted a silken halter. He was hanged at Salisbury for the murder of a man and his son under very aggravated circumstances. A third peer to suffer the law's last penalty was Lord Sanquire. His crime was the murder of a fencing master, who in a fencing contest had gouged out the peer's left eye. "Does the man still live?" asked Henry IV. of France, when Lord Sanquire related the incident to him, and the question so impressed his lordship that he straightway went back to London and planned the murder of the fencer. He was executed on a scaffold erected in the palace yard at Westminster.

## A LAWYER'S STUDIES IN BIBLICAL LAW.

### THE POSITION OF WOMEN.

By DAVID WERNER AMRAM.

**A**LTHOUGH it is unquestionably true that women in patriarchal society occupied a position inferior to that of men, their general inferiority has been very much exaggerated. The legend in Genesis which states that in the beginning woman was made subject to man, reflects the condition of things at the time when this legend was current among the people. It was not only the wife but also the unmarried woman who occupied an inferior position. It is to be remembered, however, that it is her legal status only that was inferior. There is ample evidence throughout the Biblical records to show that in other respects her status compares very favorably with that of women in much later and more modern states of society.

As a maiden, the woman was subject to

the authority of her father; as a wife she came into the power of her husband; as a widow she was inherited together with the rest of the family property by the successor of the patriarch; and as a divorced woman, she was sent back to the family from which she had been taken. This statement represents her condition in the most ancient patriarchal society, although in that state of society which is described in the Bible, her position had been materially changed.

Among nomadic herdsmen, the dangers to which the unprotected woman was subject rendered this condition of dependence desirable. With the beginning of the civilizing influence of agricultural pursuits, and the beginning of industrial life in the cities, the character of the patriarchal family and the

position of its members were changed, and women not only enjoyed a large amount of freedom, but even acquired legal rights. The maiden who at one time might have been bartered away or sold by her father, acquired the right of veto. This is indicated in the story of the wooing of Rebecca — her consent was asked. A similar change is found in the condition of the widow and the divorced woman, neither of whom originally acquired independence, although under the later law they became absolutely free to dispose of themselves as they saw fit. The widow was largely dependent upon the bounty of her husband's heir, because the law gave her no share in his estate. This was probably due to the ancient principle of the inalienability of the family property, the danger being that if she were given a share in it, it might be carried out of the family of her husband into the family of her father or of her second husband. Some provision is made for her, however, in the nature of a dower right; and the only distinction between her status and that of the unmarried woman was that she was not permitted to be married to a high priest.

As to the divorced woman, we find the same principles governing her legal status. She was not permitted to be married to a priest; she was protected in her property rights; and was generally found to be the subject of legal discussion in company with the widow. All the successive stages by which the property rights of the widow and divorced woman were secure, are not without interest, but inasmuch as they trespass on the field of Talmudic jurisprudence, they will not be enlarged upon at this time.

The dowry given to the father upon the marriage of his daughter was the purchase money which the husband paid for her; and undeniable traces of the original commercial nature of marriage are to be found in the Bible, although the society therein described

has already passed through the lower stage of matrimonial bargains. When Shehem desired to marry Dinah, he said to her father and her brothers (Genesis xxxiv, 11-12), "Let me find grace in your eyes, and what ye shall say unto me I will give; ask me never so much dowry and gift and I will give according as ye shall say unto me."

Under the theory of the patriarchal law, the wife could not own property separate and apart from her husband; she had no right to her person, so that the money which she earned by her labor, or damages which she recovered for injuries done to her belonged to her husband; she could not even make a vow against her husband's will. But at a very early period customs arose which recognized certain rights of the woman against her husband and these rights could in some way be enforced. The Mosaic law provides that if the husband fails in the performance of certain duties towards her she shall go out free. It does not state how the husband could be forced to let her go, but it must be presumed that an adequate method of enforcing the law existed. Perhaps the wife had a right to go before the elders of the city and make her complaint before them so that they could determine the question as between her and her husband. This is a long step from the simple rule of the patriarchal age under which the husband was amenable to no authority for his government of the family.

Similarly the Mosaic law put an end to the husband's right to sell his wife when he was no longer pleased with her: (Exodus xxi, 7-11) "And if a man sell his daughter to be a maidservant, she shall not go out as the menservants do. If she please not her master who betrothed her to himself, then shall he let her be redeemed; to sell her unto another he shall have no power seeing he hath dealt deceitfully with her." In this

case the bondwoman who has been betrothed to her master acquired certain rights, among them exemption from being sold by him. It is fair to presume that if the bondwoman had such rights the free born woman had equal if not stronger rights.

The patriarchal family was polygamous. The Biblical records take polygamy for granted, and it is unnecessary to give any citation of this very obvious fact. Even such a purely ethical passage as "Therefore shall a man leave his father and mother and shall cleave unto his wife, and they shall be one flesh" (Genesis ii, 34), is not incompatible with polygamy. It simply indicates that polygamy was not in the foreground of the writer's mind, and it cannot properly be construed into a legalization of monogamy. It is true that the old traditions in Genesis assigned but one wife to many of the ancient patriarchs, such as Adam, Cain and Noah. This, however, is merely negative evidence, and does not preclude the idea that they may have had more than one wife, excepting Adam, who was perforce obliged to be a monogamist.

There is a curious incident in the story of Jacob and Laban which has interest in this connection. Laban said to Jacob (Genesis xxxi, 50), "If thou shalt afflict my daughters or if thou shalt take other wives besides my daughters, no man is with us; behold God is witness between me and thee." It appears that Laban sought by this solemn adjuration to prevent Jacob from marrying any other woman who might divide his affections with Leah and Rachel. It is not improbable that the paternal interest which by such means sought to protect the daughters against the danger of rival wives may have been one of the early steps toward the development of monogamic marriage.

The levirate marriage was a peculiar institution arising out of the notions of family

solidarity, of preservation of the family estate, and the perpetuation of the family name. This law (Deuteronomy xxv, 5-10) provides in substance that if brethren dwell together, and one of them dies without child, his wife shall not marry a stranger, but shall be married to her husband's brother, and their first-born child shall succeed to the name of the brother that died, so "that his name shall not be put out of Israel."

Before the Mosaic age, marriage with a brother's widow was lawful whether there were children or not. This, however, seems to have offended the moral sense of later generations, and the law forbade such marriages except in the case above cited where there were no children of the first marriage. The purposes of the law, as has been said, are principally to prevent the extinction of the family, and a legal fiction was resorted to whereby the nephew was considered the adopted child of the deceased uncle, in order that the name of the latter, to wit, his family, might not be put out of Israel.

The story of Ruth and Boaz indicates that at some period of Jewish history, probably a very early one, it was the duty of not only the brother of the deceased to marry the widow, but that other kinsmen were expected to perform this duty. This also appears from the story of Tobit (Tobit iii, 15-17; vi, 11-12; and vii, 12).

The change from the old patriarchal absolutism to the more modern view of the relation of parent and child, as well as of men and women is indicated in the Fifth Commandment: "Honor thy father and thy mother that thy days may be prolonged in the land which the Lord thy God giveth thee." Here the blessing of long life is promised to the obedient son, because such obedience is pleasing to God; whereas under the old patriarchal system, obedience to the father probably resulted in long life, but not

for the same reason, inasmuch as it lay within the power of the father to put an end to that life whenever he pleased. It should be noted, also, that in this Commandment the mother's name is coupled with that of the father. This indicates that she was obtaining a position of equality before the law. To the same effect are the following two laws: "He that smiteth his father or his mother shall surely be put to death" (Exodus xxi, 15); "He that curseth his father or mother shall surely be put to death." (Exodus xxi, 17).

The subject of the status of women among the ancient Hebrews is rarely treated in a scientific manner. Whenever the question is discussed, it is usually for the purpose of drawing parallels between women in ancient Hebrew society and women in modern twentieth century society, to the disadvantage of the former. The true point of view, however, is thus lost sight of.

In considering ancient institutions, it is the duty of the fair-minded student to place him-

self in the position of a contemporary. If he desires to test the ethical soundness of any legal institution, he must do it by the moral principles recognized and in vogue at that time, and not by the different principles which have been accepted by later generations. By this test some of the Biblical stories, such as the story of Lot's daughters and the story of Tamar, which are condemned as showing a lack of moral sense in the people of those times, are perfectly justifiable upon ethical grounds; and it can be shown that under the moral ideas prevalent in those days, these acts were entirely right, and, indeed, highly commendable, although if committed to-day, they would be universally and justly condemned.

This point of view, of course, assumes that an act may be right at one time in the history of the race and wrong in another. This appears to the writer to be the only true principle to be applied in judging the moral value of human actions.



# The Green Bag.

---

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

---

Communications in regard to the contents of the Magazine should be addressed to the Editor,  
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

---

*The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.*

## NOTES.

"GUILTY, or not guilty?" asked the court.

"I don't know that I exactly understood the information," replied the bank president. "If it charges me with misappropriation of funds, guilty; if it says larceny, certainly not!"

THERE is a Kentucky circuit judge who is a strong believer in his own infallibility. Not long ago, a bank official was convicted in his court of a misappropriation of funds, after a trial in which many technical points had been raised. He was remanded for sentence until the end of the criminal calendar should have been reached. On the night before judgment the prisoner suddenly expired in his cell. The next morning the court officer informed his honor of the occurrence.

"You will never have to sentence Smith," said the officer. "He has gone to a Higher Court."

"I bet," replied the presiding judge, "that the case will be affirmed."

THE late Henry C. Parsons of Williamsport, Pa., was one of the ablest practitioners in the State and quite ready at any time to take a technical advantage of the opposing counsel, if opportunity offered. Upon one occasion he was called into the neighboring county of Tioga, to assist in the trial of a case in the Common Pleas, then presided over by Judge Williams, now of the Supreme Court of Pennsylvania. Upon his arrival at the county seat, and after a consultation with his client, he found that they were totally unprepared for trial and yet had no legal grounds upon which to base a motion for a continuance. In this dilemma it occurred to him to examine the *venire* summoning the jurors,

and to his great delight he found that it had been improperly returned. Early the next morning, therefore, he appeared in court and made a motion to quash the *venire*, because it had not been legally returned. After examination, the Court, with evident disgust, was compelled to grant the motion. Afterwards, in relating the occurrence to a friend, Parsons' client said, "I tell you, that man Parsons has got a hull slop-bucket full of brains. Why, man, when he made his pint, he just squashed the hull court."

HENRY W. PAINE, on being familiarly accosted on the street by a man whose face he did not recall, turned to him and said, with his usual dignity: "Sir, I do not recognize you."

"Why," replied the man, "you tried a case for me more than twenty years ago."

"Still, sir, I do not recollect."

The man looked at him earnestly: "Pardon me, sir, I took you for Mr. D."

Paine drew himself up to his full height. "Sir," he said, "I hope the devil won't make that mistake bye and bye."

JUDGE DAVID DAVIS, said Judge J. Otis Humphrey, in an address at the annual meeting of the Illinois State Bar Association, "was known far beyond the limits of his circuit for the care which he invariably took of trust estates. On one occasion a bill was presented to him in the McLean Circuit Court for a sale of land by a guardian for reinvestment. Judge Davis listened to it until he caught the substance of it, and he said: 'You cannot do that, Sam; all the money my father left me was stolen by exactly that kind of a proceeding.' Again, over in Vermilion Circuit, a similar bill was presented for sale and reinvestment of a ward's estate, and, as I remember the Vermilion case, it was based upon the reason that the improvements on the real estate were deteriorating. He listened to the reading of the bill, and



granted a decree ordering the sale, but providing that the money should be brought into court to await the further order of the Court. As quick as the money did come in, he started for Springfield, went to the land office, and invested it himself in public lands at the government rate, and then went back and said to the trustee: 'There won't be any deterioration of the improvements on these children's land now.'"

THE following novel answer in a suit against the *Yale Record* by the Yale University Club, for the bill for a banquet served to the editors, has been printed in the columns of the defendant paper, but, so far as we know, has not yet been filed in court:

The defendants herein answering the greeting of the honorable sheriff, herein respectfully return thanks and wish him the same; they have no knowledge of the Legislature of the State of Connecticut having granted the Yale University Club a charter, but if by any possibility it should be the fact, these defendants await from said Legislature a due and ample apology.

The defendants claim and insist that it is now a matter of public notoriety, of which judicial notice should be taken, that said club is not nor ever has been capable of furnishing a dinner. Defendants admit that on the last mentioned date it did contract with the said club for a dinner for themselves and their guests, and did attend at said club for the purpose of consuming and enjoying the same, but, instead thereof, the said club negligently, knowingly, maliciously, wickedly, falsely, and fraudulently imposed upon these defendants and each of them and their guests, vile stuffs, decoctions, poisons, mysteries, mixtures, etc., much to their surprise, chagrin, humiliation, mortification, and despair, whereby these defendants have been injured in bodily health.

The defendants are entitled to heavy damages, which they refrain from insisting upon, well knowing, to their sorrow, the financial straits of the said plaintiff.

JUDGE J —, of Texas, tells the following anecdote on himself: "In the early seventies, I had just been admitted to the bar and to a partnership with my father, who was a venerable member of the bar. We were employed to defend a

man in the Federal Court charged with selling liquor to the Indians, a crime to which there was a very heavy penalty attached.

"The District Attorney was a six-foot three-inch gangling son of Vermont, with a very pronounced nasal twang. The defendant was very nervous about the result, for which he doubtless had good reason. After a motion for a continuance was overruled, and every dilatory plea that the brain of a skillful advocate could interpose had been disposed of, the trial proceeded.

"It was a very warm day and as the case had awakened a good deal of interest, every denizen of the sleepy old village that could find standing-room had squeezed into the court room.

"It was my first case, and I realized to the full extent my importance. I would frequently whisper to my father and cast my eyes at the audience to watch the effect, but I was very much disappointed, when, after the evidence was concluded the Court announced that he would permit only one speech from the defendant's counsel.

"The jury were out about three hours, and coming in announced to the Court that they had agreed upon a verdict. As usual the Court ordered the defendant to 'Stand up.' The court-crier called for him, but he did not respond, and search was made amongst the audience, but he could not be found. Whilst all this was going on, I noticed that the District Attorney was eyeing me very closely, and after the hubbub had subsided he arose and pointing to me, said, 'Your Honor, there is the prisoner.' This was greeted by a side-splitting burst of laughter from the audience, lawyers, and court officers. The judge laughed until he almost had a case of apoplexy.

"I do not know which felt most ashamed, the District Attorney or myself, but I am sure I would have exchanged places with the defendant who, on his flee-bitten pony, was splitting the wind on the way to his hospitable retreat in the Indian Territory."

To a valued English correspondent, "J. M.," we are indebted for the following interesting note concerning Earl Russell's divorce bill:—

Earl Russell, who has gained most notoriety by being petitioner, respondent, and co-respondent, startled the House of Lords by introducing a bill to facilitate divorce.

It is first necessary to consider the grounds for dissolution of marriage as the law now stands, so that we may more readily appreciate the sweeping bill introduced by the noble Earl.

The Matrimonial Causes Act, 1857, provides that it shall be lawful for any husband to present a petition to the Court praying that his marriage may be dissolved on the ground that his wife has, since the celebration, been guilty of adultery; and the wife may present a petition because of incestuous adultery, or bigamy with adultery, or rape, or bestiality, or adultery coupled with cruelty, or for adultery coupled with desertion for two years or upwards.

Earl Russell said he proposed in his bill to extend the grounds on which a divorce might be granted to five. He would grant it for cruelty, the fact that the other party was undergoing penal servitude for a term of over three years, that the other party was found to be of unsound mind under the Lunacy Act of 1890, that the parties had lived apart for three years and did not intend to resume marital relations, and that during three years the parties had lived apart, and the other party concurred in the petition. In all cases he would put women on an equality with men. He also proposed to alter the procedure of the Divorce Court by abolishing the ecclesiastical jurisdiction and assimilating it to that of the King's Bench Division of the High Court. Another clause in the bill proposed to give a jurisdiction in divorce to the County Courts where the united income of husband and wife did not exceed five hundred pounds a year. He proposed to do away with the decree *nisi* and the interval of six months, and would make every divorce effective from the time that the period of appeal had passed. Some of their Lordships might regard the provisions of the bill as novel, and even unheard of, but that was not so. In the course of the debates on the Divorce Bills of 1856 and 1857, nearly all the suggestions he now made were made, and, as to the proposal to abolish the present judicial separation, it was supported by Lord Palmerston. The proposals of the bill were not so novel as they might at first sight appear to be. One of the clauses of the bill provided that divorce might be granted after one year's separation, when both parties concurred in the petition. The Legislature

should, so far as possible, place the parties in the position which they occupied before, when they discovered that they had made a mistake. Clause 12 of the bill provided that where the total joint annual income of a husband and wife did not exceed £500, a petition for dissolution of marriage might be presented to the County Court of the district in which either the petitioner or the respondent dwelt or carried on business, the judge of a County Court to have all the powers of a judge of the Probate, Divorce, and Admiralty Division of the High Court of Justice. This was no new proposal, for it was embodied in a bill introduced by the Government in 1857. Clause 17 provided for legitimization of a child by the subsequent marriage of its parents. This country stood alone amongst civilized nations in refusing this relief.

The noble Earl spoke for an hour and a half, and some idea of the contempt with which the speech was received can be gathered from the fact that the Lord Chancellor, instead of calling on Lord Halifax, who was to lead the opposition, took the unusual course of inviting the House to reject the bill. His speech, and the voting, occupied less than twenty minutes. The following is an extract from his short, but effective speech:—

"The Lord Chancellor—My Lords, I very much regret that such a bill as this has been introduced into your Lordships' house. I cannot help thinking that if the custom, which recently obtained in the House of Commons, requiring leave to be given to introduce a bill, prevailed in this House, no leave ever would have been given for the introduction of this bill. In the noble Lord's voluminous observations we have heard a great many things which might be the subject of debate, but the main provision of the bill, the first clause, shows that practically this bill is one for the abolition of the institution of marriage. That in itself is enough, I think, to prevent the discussion of the bill. I should be very sorry to think that in this House the question whether marriage should continue to exist in this country should be considered a subject for debate [cheers]; and, to prove that this is so, it is only necessary to read to your Lordships the following section of clause 1: 'That, during the year preceding the presentation of the peti-

tion, the parties to the marriage have lived apart, and that the other party concurs in the petition.' That is to say, that if two people have married and entered into the most solemn obligation that can possibly exist among mankind, it is enough for them to live apart for one year and both consent to the dissolution of the marriage, and upon that the Court shall pronounce a decree of divorce: I take that alone—I decline to discuss a great many of the other topics which might fairly be the subject of discussion—I take that alone, and I say that such a provision as that is an outrage upon your Lordships' House, something in the nature of an insult to your Lordships, and it is a thing which I, for one, deprecate most intensely, and I therefore propose to take this course. Of later years it has been the custom that what is, in effect, a postponement of a bill should be moved, and not its rejection. In an earlier period of your Lordships' history it was very common to move the rejection of a bill, and I propose to move the rejection of this bill. I should have thought it would have been more in accordance with the ordinary practice of your Lordships that I should move an amendment to the second reading in order to introduce the word 'rejection'; but on looking up the precedents, I find it is more usual, first of all, to negative the motion for the second reading, and then subsequently to move the rejection of the bill. I propose to take that course [cheers].

"The Lord Chancellor then put the question, 'That this bill be now read a second time,' and the motion was negatived.

"The Lord Chancellor—I now move 'That this bill be rejected.'

"The motion was agreed to amid cheers."

The matter attracted very little public attention, and it seemed to be generally agreed that the decision of the Peers was an emphatic demonstration that there are limits to the tolerance of an English legislative assembly, and that there are some affronts to its moral sense which it declines to treat merely with good-humored contempt.

It will be within the recollection of the American people that Earl Russell was sentenced by the Lord Chancellor, as Lord High Steward, to a term of imprisonment for bigamy committed in the State of Nevada.

#### LITERARY NOTES.

READERS OF THE GREEN BAG will recall with pleasure the article in the November, 1901, number on "Webster as an Orator," which was an extract from the "Webster Centennial Oration" delivered by Samuel W. McCall at the Webster celebration at Dartmouth College, in September of last year. This address<sup>1</sup> has now been published in book form.

The occasion which called forth the address was a notable one, but it can be fairly said that the orator rose to the occasion. Without exaggerating his achievements, and considering in a spirit of fairness the points in his career which are open to debate, Mr. McCall has given us a scholarly study of Webster which has both literary merit and historical value. As was to be expected, we find here the same admirable independence of thought and judgment which has been displayed courageously more than once by Mr. McCall in political matters.

Mr. McCall's address falls naturally into three principal parts,—the consideration of Webster as an advocate and lawyer, as a political orator, and as a statesman. His great work in statesmanship is somewhat beyond our field, and the extract referred to above treats of his oratory. We shall content ourselves, therefore, with quoting here, briefly, from what is said of Webster at the bar.

"It can be said without exaggeration," says Mr. McCall, "that more nearly than any other, Webster filled the large circle of requirements for that high place, and that he stands at the head of the whole American bar. . . . He was doubtless excelled in some departments of his profession by other lawyers; Curtis was more deeply versed in the law; Choate surpassed him, as indeed, he surpassed all others, in the constant brilliancy of his advocacy before juries, although Webster made one speech to a jury [in the White murder case] which Choate never equalled." But it is especially of the comparison between Webster and William Pinckney,—the most conspicuous figure at the bar during the first thirty years of the Supreme Court's existence,—that Mr. McCall speaks. "They were never," he says, "fairly measured against each

<sup>1</sup> DANIEL WEBSTER. By *Samuel W. McCall*. Boston: Houghton, Mifflin and Company, 1902. Cloth: 80 cents, net. (124 pp.)

other. Webster came prominently into view just as Pinckney's sun was setting." The fair comparison, therefore, "would be between Pinckney at the summit of his fame, when he attempted to press for a re-argument of the [ Dartmouth ] College cause and John Marshall turned his 'blind eye' towards him, and Webster at the same age and period of his career, after he had argued that long line of important constitutional causes, had delivered the Bunker Hill oration and the Reply to Hayne, had become known abroad and his own country rung with his fame, and when he stood the unchallenged leader of a far larger, if not a more brilliant, bar. . . . Take Pinckney's greatest efforts at the bar, in the Senate, or in diplomacy, and compare them with the corresponding efforts of Webster, and I believe the superiority of the latter will be distinctly seen. . . . A great mass of Webster's legal work survives, and insures him a permanent fame as a lawyer."

THE New York bar lost one of its best known characters by the death of the late Tom Nolan, "The Barrister," whose claim to fame rests on his Irish wit and humor, rather than his knowledge of the law. Numberless stories concerning Counsellor Nolan, some true, some apochryphal, have long been current; and some of these have been published recently in a small volume, under the title of *The Barrister*,<sup>1</sup> which furnishes an hour's interesting reading.

The following quotations show the quality of the Barrister's sayings:

On one occasion Nolan was giving his views about some of the judges and lawyers. "There's Smyth," said Nolan, "he's a good judge, a foine judge, but he thinks ivery man ought to go to prison at least wance."

Counsel for a defendant railway corporation having made a motion to dismiss an action, the Court asked Nolan what he had to say in answer, to which he replied:

"If your honor plase, I've tried four cases this wake, and aich one of thim was dismissed by the Coort. Therefore, I hope your honor will allow this case to go to the jury."

<sup>1</sup> THE BARRISTER. Being anecdotes of the late Tom Nolan of the New York bar. With portrait. Compiled by Charles Frederick Stansbury. New York: Mab Press, 1902. (viii+264 pp.)

Nolan having been retained to defend a boy who had fallen into the clutches of the law, was asked by the parish priest what the probable outcome of the case would be.

"Your Riverence," replied Nolan in a hoarse stage whisper, "as regards the chances of the case, I feel sure that with your Riverence's infloence and a little perjury I can get the bye off!"

Sometimes the Barrister's eloquence soared to poetic heights, as in the following instance:

"Far be id fr'm me t' disagree wid yer honor's expectashins or intinshins in the case. But whin yiz spaik t' me ov justice iminatin' fr'm th' source yer honor indicated, me faith in human naytchure gets shaken on its pidistal, and I trimble for th' consequinces, so far as this poor client ov mine is concern'd. No, yer honor, yiz might as well ixpict t' see th' bright an' effulgint harvest moon shine in resplindint rays through th' attinuat'd sait ov me poor client's breeches as to look for justice fr'm that soulless corporayshin. Lord have mercy on us!"

Mr. Nolan was once retained by the defendant in a suit at law brought to recover payment of a gas bill, in which a witness for the plaintiff was asked:

"On what evidence do you conclude that sixteen thousand, seven hundred and forty feet of gas had been burned during the month by the defendant?"

"On the evidence of the gas meter," was the answer.

At which the Barrister impulsively exclaimed: "I wouldn't believe a gas meter under oath!"

On another occasion Mr. Nolan was arguing a case in behalf of clients who were sailors, and, while in the midst of an exhaustive display of nautical scholarship, was interrupted by the Court:

"How comes it, Counsellor, that you possess such a vast knowledge of the sea?"

"Of course I have, your honor. Does your honor think I kem over in a hack?"

The following plea for judicial mercy, showing every evidence of the touch of the Barrister's fine Italian hand, will be found brimful of pathos and Nolanesque eloquence:

"To the Hon. Judge of the City Court, in Equity: Your petitioner, Samuel, would deferentially represent that on the 10th day of January, in the year of grace 1891, your honor

dissolved the connubial ties theretofore existing between petitioner and his consort, Annie, granting her a divorce *a vinculo matrimonii*, with the beatific privilege thereunto annexed of marrying again, a privilege, it goes without saying, she availed herself of with an alacrity of spirit and a fastidious levity disdaining pursuit; but on this vital point your honor extended to petitioner only the charity of your silence.

"Petitioner has found in his own experience a truthful exemplification of Holy Scripture, that 'it is not well for man to be alone,' and seeing an inviting opportunity to superbly ameliorate his forlorn condition by a second nuptial venture, he finds himself circumvallated by an Ossa Pelion obstacle which your honor alone has power to remove.

"His days rapidly verging on the sere and yellow leaf, the fruits and flowers of love all going; the worm, the canker, and the grief in sight, with no one to love and none to caress him, petitioner feels an indescribable yearning, longing and heaving to plunge his adventurous prow once more into the vexed waters of the sea of Connubiality: Wherefore, other refuge having none, and wholly trusting to the tender benignity and sovereign discretion of your Honor, petitioner humbly prays that in view of the accompanying fiats of a great cloud of reputable citizens, giving him a phenomenally good name and fair fame, you will have compassion on him and relieve him of the hymeneal disability under which his existence has become a burden, by awarding him the like privilege of marrying again; thus granting him a happy issue out of the Red Sea of troubles into which a pitiless fate has whelmed him. For, comforting as the velvety touch of an angel's palm to the fever-racked brow, and soothing as the strains of an Æolian harp when swept by the fingers of the night-wind, and dear as those ruddy drops that visit these sad hearts of ours, and sweet as sacramental wine to dying lips, it is when life's fitful fever is ebbing to its close to pillow one's aching head on some fond, wifely bosom and breathe his life out gently there.

"And in duty bound to attain the possibility of compassing such a measureless benediction, petitioner will pray without ceasing, in accents as loud and earnest as ever issued from celibatarian lips."

#### NEW LAW BOOKS.

A TREATISE ON INTERNATIONAL PUBLIC LAW.  
By *Hannis Taylor, LL.D.*, Late Minister Plenipotentiary of the United States to Spain. Chicago: Callaghan and Company. 1901. \$6. (lxxvi+913. pp.)

From the establishment of our government until the present generation the United States has consciously pursued a systematic and traditional policy of abstention from the foreign affairs of the old world. The first President advised his countrymen to keep free from "entangling alliances," and himself furnished an example in very trying circumstances which has been followed as an article of faith by his immediate successors. That necessity had as much to do with the policy as choice is evidenced by the frequent intervention of our government in the affairs of the Central and South American Republics—a policy due to a generous desire to protect them, in which, however, enlightened self-interest was intermingled with Pan-American philanthropy. But the necessity that dictated isolation, has passed and with it the policy of isolation, for since the war for the preservation of the Union our relations with Europe have grown more intimate and complicated. Within the last four years we have waged, whether rightly or wrongly, a war with Spain; our soldiers have for the first time since the recognition of our Independence made common cause with Europe and fought shoulder to shoulder with Europeans and Asiatics, and at the present day we are engaged in putting down resistance to our authority in the Philippines.

We are therefore deeply and rightly interested in foreign affairs, and a familiarity with international law by which the foreign relations of nations are supposed to be determined has become a matter of prime moment. The subject has always attracted our lawyers, statesmen and scholars and its study and mastery is now more than ever of practical importance to a nation peculiarly open to practicality.

Our situation has materially changed and it is but natural that our ideas if not our ideals should change, and our conceptions of international law have undergone essential modification. "During the last fifty years," says Dr. Taylor, "international law, as a living and growing organism, has passed through a more marked

and rapid development than in any other single epoch in its entire history." In an interview with Von Martens the first Napoleon is reported to have said, "We must have a new law of nations," and the rapid movements of the past fifty years to which Dr. Taylor calls attention in his preface make imperative a restatement of the old law. If they do not call for a "new law" as Napoleon suggested, they at least call for a modification of the traditional system. The text-book of a generation ago is in a sense antiquated, and a new edition can hardly keep it up to date. The classic treatise, of Wheaton has not found an American editor since the sixties, and recent treatises however admirable or commendable they may be in other respects, do not set forth in adequate detail the changes that have come over the world.

To take a single specific instance: "A Text-book of International Law," says Mr. Holls, "without a careful discussion of The Hague Treaty for the Peaceful Adjustment of International Differences is hereafter quite as unthinkable as a history of English Constitutional Law containing no reference to Magna Charta or the Bill of Rights." And the same great authority goes so far as to term the treaty mentioned, "The Magna Charta of International Law."

It is, therefore, with reason that Dr. Taylor, our former minister to Spain and widely and favorably known by his work on the English Constitution, should set himself task of a restatement and re-examination of the fundamental rules and principles of international law, and the recent publication of his work is in all senses of the word timely.

That the author states the law and states it correctly will be admitted by any one who makes even a cursory examination of the book, and the authorities, English and American, as well as Continental, are elaborately cited. But historical precedents, opinions of text-writers and adjudicated cases are given like weight and importance. The view, however, of a distinguished jurist is after all a personal view or at best a dictum, if it is not a digest of authorities, and the mere enumeration of discordant views does not solve a difficulty. It is sometimes necessary to adopt the heroic method with the Gordian knot: to cut away the mass of history and repetition

in order to substitute a clear-cut statement of one's own, based upon the principle of the thing.

This Dr. Taylor does not always do, and it is sometimes difficult to know to what extent he shares the views cited. An example of this may be instanced in the discussion of the effect of extinction on State obligations (pp. 201-205), when a rigid and critical examination of underlying principles would be more illuminating than a mere summary of the weight of authority; for where authority is clearly wrong from a legal point of view, or where authorities differ, the only way is to test the rule in the light of legal theory. History may well show experience and practice, but it does not disclose the fundamental principle, though it may well illustrate or supplement the principle when found.

This failure to distinguish between history and law, leads the author to ascribe, it would seem, undue importance to the Monroe Doctrine. In American diplomatic history its place is great, but Europe, while it takes note of its existence, considers it rather a matter of American policy than as binding upon European States. The ratification of the doctrine at The Hague would seem rather to be an admission that the doctrine is binding on the United States than that it binds Europe. In any case, it certainly seems too early to look upon the doctrine as a source of international law as the author does in part 11, chapter vi.

But this is said more in criticism of the method than of the book. Dr. Taylor has chosen to adopt the historical method in treating international law and he has, therefore, written a history of the development of his subject rather than a treatise on international law. That is, his work is more of an historical treatise than a law treatise. That international law is positive law in the United States, whatever it may be elsewhere, he clearly recognizes, and he likewise states the principle that our courts take judicial notice of it as such (the *Scotia*, 14 Wallace 170). But the Supreme Court lays down in a recent case (the *Paquete Habana*, 175 U. S. 677) that international law as such is not binding, but only the international law applicable to our situation, and that the opinions of jurists and commentators as such are not binding upon us. The passage at page 700 deserves quotation, for it shows not

only how international law is binding, but it gives an authoritative list of its sources as far as the United States is concerned.

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

If, therefore, this view of the subject be correct, international law is part of our municipal law, and if such, it should be considered from a legal standpoint and submitted to a rigid legal examination and analysis. Treatises as such, other than those concluded by the United States and the statements of foreign jurists and commentators lose much of their force. Their enumeration may indeed show what European nations and publicists think, but they can hardly be cited to show what the United States holds international law to be. A careful study of the sources enumerated in the *Paquete Habana* would furnish a treatise on international law in force in the United States and would be interesting to the student as well as of eminent service to the international lawyer. A book published in the United States is primarily intended for American readers; but while the author cites numerous American cases in the notes, the book is preëminently a treatise written from the historical view of the traditional European international law. It cannot, therefore, be looked upon as the final word, and the field is open to the American who wishes to write a treatise on the law administered in our courts, and applied in our foreign relations.

It should be said, however, that the historical part is well done, and that parts I and II devoted to the history, sources, and lists of writers and their works, give an immense amount of in-

formation in very small compass. The balance of the book (pp. 155-792) outlines from the historical rather than from the legal and analytical standpoint, the system of international law; the appendix contains a brief summary of the "Insular Tariff Cases," and the very elaborate index (pp. 797-912) places the entire contents at the reader's disposal.

Dr. Taylor's work has been received with great and deserved favor; not a few competent judges consider it as the best treatise since Wheaton, while others, both English and American, although more conservative, are still hearty in their praise. Halleck's work, first published in 1861, is generally considered as of great importance as the mature contribution of one who was at the same time lawyer and scholar, statesman and soldier. Taylor's book may well stand beside it, but Halleck cannot be overlooked in any well considered and balanced judgment. Pomeroy's *International Law in Time of Peace*, written in 1866-67, cannot be slighted.

Of English books, Hall's one-volume treatise — the more elaborate are left out of comparison — is already a classic, and its author's knowledge of the common law and diplomatic history, his legal and analytical mind evident on every page, produced a masterpiece which stands alone among recent contributions to the literature of the subject. Dr. Taylor has the advantage of such predecessors in the matter of date, but it is only in this latter sense that his claim to Wheaton's mantle can be admitted. His great merit consists in the careful chronicle of recent international development, and it is this, rather than its intrinsic merits, admittedly considerable, that gives the work its usefulness and peculiar value.

THE ACTS RELATING TO THE INCOME TAX. By *Stephen Dowell, M. A.* Fifth edition. Revised, altered, and considerably enlarged by *John Edwin Piper, LL. B.* London: Butterworth and Company. 1902. (lxxx + 474 + 54 pp.)

The present edition has been undertaken by direction of the Board of Inland Revenue, and seems to give full and satisfactory treatment of the English Income Tax statutes now in force, from the Income Tax Act of 1842 (5 and 6 Vict. c. 35), to the Finance Act, 1901 (1 Edw. 7, c. 7). To the English practitioner the volume would seem to be indispensable.







*H. W. Voorhees.*

# The Green Bag.

---

VOL. XIV. No. 8.

BOSTON.

AUGUST, 1902.

---

## DANIEL W. VOORHEES AS LAWYER AND ORATOR.

BY W. W. THORNTON.

DANIEL W. VOORHEES was born in Butler County, Ohio, Sept. 26, 1827. He was a grandson of a Revolutionary soldier, who fought on Princeton and Monmouth battlefields, and who was of Holland descent. Peter Voorhees' wife (Daniel's grandmother) was a daughter of Luke Van Arsdale; and was born at Bryant's Station, Kentucky, in the fort built as a defense in the Indian wars. Her people came from the north of Ireland. In Senator Voorhees, therefore, were blended both the Dutch and Irish bloods.

On the western side of Indiana, within twenty miles of the Illinois boundary line, is the old town of Chambersburg, too insignificant to have a legal existence, daily decreasing in population and importance by reason of its little but vigorous rival, the city of Veedersburg, situated, like the ancient "Mistress of the World, on her seven hills." When clothed in its primeval forest, the country surrounding these two small places was most beautiful; but the hand of civilization has been laid very heavily upon it, hill and dale stripped of their majestic robes, and clear streams of water laid bare to the scorching rays of the sun. At the present day it cannot be said that the country is noted for its beauty, nor for the richness of its soil. It is less than thirty-five years since the first locomotive whistle was heard in the fastnesses of this region, affording an outlook to the world.

It was within three miles of this decaying town of Chambersburg that the father of Daniel settled, when his child was only two months old; and it was here that the child grew to youth on his father's farm, and there resided until his college days began.

From his early youth, he, much to his father's disgust, manifested a dislike for manual labor. Sent to the field to plow corn, he would most likely be found stretched under the shade of a tree reading a book. While his brothers spent their money for the purchase of knives and pocket-handkerchiefs, he spent his for books, purchasing such as the very limited book-counter in the general store afforded. His father recognized the necessity of sending him to college in order to make something of him. The meagre education of the country district school was sufficient to enable him to enter Asbury University, located at Greencastle, forty miles west of Indianapolis, and now called "DePauw University." Asbury (as one would naturally infer from the name) was a Methodist institution, the college of that denomination for Indiana. The fact that young Voorhees was able to pass directly from a backwoods country district school through its portals into full college life, and graduate at the end of four years, does not give one the impression that its educational standard had been set very high. In fact, the colleges of Indiana at that day — 1845 to 1849 — were little, if any, better

than the State's high schools of the present day. He entered college clad in a suit of clothes of homespun, woven on his mother's loom, and having a country cobbler's rough shoes on his feet.

At college young Voorhees was noted for his powers of oratory, one of his teachers, Professor Larrabee, stating that he was "a natural orator," and predicting that he would some day "take rank with the first men of the nation."

From the halls of Asbury he went immediately into the law office of Lane and Wilson, at Crawfordsville, Indiana. The practice of the senior member of this firm, Henry S. Lane, was one of the most lucrative in the State. He was an orator of no mean attainments, having remarkable success on the "stump" and before juries. He was afterwards chairman of the Republican National Convention in 1856, that nominated Fremont for President; was elected Governor of the State in 1860; served as United States Senator from 1861 to 1867, and was not only a personal friend of Lincoln long before either of them held office, but was one of his closest advisers during his entire presidential career. The oratory of Senator Lane was fascinating to the young law student, in many ways serving him as a model.

He soon graduated from the office of Lane and Wilson. In those days students in Indiana did not read law very long before attempting to practice. The common law practice then prevailed. In April, 1850, he opened an office in Covington, the seat of justice of the county where he had been reared,—a half a score of miles from his old home. Edward Hannegan, formerly minister to Berlin from this country, and afterwards Senator, was so impressed with young Voorhees' speech delivered at a Fourth of July celebration, that he invited

him to unite in a partnership with him. In April, 1852, the partnership was formed. Hannegan was a brilliant but erratic man; and then the leading lawyer of Covington, having a large practice.

In June, 1856, Governor Wright appointed Mr. Voorhees prosecuting attorney for the district in which Covington is situated. He made in this office a fine reputation as a "criminal lawyer," and broke up a "nest" of criminals who had long defied the power of the law. In 1856 he was nominated by acclamation as the Democratic candidate for Congress; and reduced the two years' previous adverse majority of 2619 to 230.

In November, 1857, Mr. Voorhees removed to Terre Haute. It was then as now the largest city in western Indiana, and had among the members of its bar some of the best lawyers in the State. Richard W. Thompson, afterwards a member of Congress and Secretary of the Navy under President Hayes, was a member of that bar, and was then in his prime. Few in the State excelled him in his powers as a popular speaker,—a power he retained until after he was fourscore years of age. Bayliss W. Hanna, a member also of the Terre Haute bar, afterwards Minister to Uruguay during President Cleveland's first term, was noted for his fascinating style of address, and the purity of his diction as a speaker. Thomas H. Nelson, likewise of the bar, afterwards Minister to Mexico, had a State reputation as a public speaker. He and Voorhees, although bitter political enemies, remained warm personal friends and companions until death parted them.

In April, 1858, Mr. Voorhees was appointed by President Buchanan United States District Attorney for the District of Indiana, in which position he increased the reputation as a lawyer and orator he had

already achieved. In 1860–1862 he was elected to Congress. In 1864 he was again returned, but on a contest his seat was awarded to his political opponent. In 1866 he refused to be again a candidate for Congress, but was re-elected in 1868 and 1870, and defeated in 1872.

On the death of Senator Oliver P. Morton, in November, 1877, Mr. Voorhees was appointed by Gov. James D. Williams to the vacancy thus occasioned; which position he held until March 3, 1897, when he was succeeded by Hon. Charles W. Fairbanks.

Mr. Voorhees first achieved a national reputation as an orator in defense of John E. Cook, in 1859, one of the followers of "Osawatimie Brown" in his raid on Harper's Ferry. Cook was a fair-haired boy, scarcely of age, and a brother of the wife of Ashbel P. Willard, then Governor of Indiana. Gov. Willard sent for Voorhees, who was in a distant county arguing a case, to go to the defense of Cook. Voorhees left in the midst of the argument, proceeded at once to Indianapolis; and, against the advice of his friends, left forthwith for Charlestown, Virginia. His friends were fearful for his personal safety; but Voorhees was perfectly indifferent on that subject. Brown was convicted of treason and murder; but Cook only of murder. An appeal was made to Gov. Wise of Virginia, by Gov. Willard, for executive clemency on behalf of Cook; but Wise, very injudiciously, refused to grant him a pardon. It was a great mistake on the part of Wise; for Cook was little more than putty in Brown's hands. Cook confessed his crime before the trial.

In the whole range of forensic oratory there is not a more eloquent and forcible appeal to a jury for leniency than Voorhees made in defense of Cook. He was then thirty-seven years of age, conscious of his great powers, possessing a magnetic power

over all who approached him, having an unusual command of language, and endowed with a fine, poetical imagination. The mere reading in silence the leaden pages embalming this oration for posterity stirs the heart with unusual emotions. Nothing but great political excitement and fear of public opprobrium prevented a different verdict.

Very naturally the appearance of an Indiana lawyer in a Virginia court, to defend an Indiana man, who had committed a heinous crime against the laws of Virginia, would greatly tend to raise a prejudice against the defense. With consummate skill Voorhees sought to put this aside: "I come from the sunset-side of your western mountains — from beyond the rivers that now skirt the borders of your great State — but I come not as an alien to a foreign land, but rather as one who returns to the home of his ancestors, and to the household from which he sprang. I come here not as an enemy, but as a friend, with interests common with yourselves, hoping for your hopes, and praying that the prosperity and glory of Virginia may be perpetual. Nor do I forget that the very soil on which I live in my western home was once owned by this venerable commonwealth as much as the soil on which I now stand. Her laws there once prevailed, and all her institutions were there established as they are here. Not only my own State of Indiana, but also four other great States in the Northwest, stand enduring and lofty monuments of Virginia's magnanimity and princely liberality. Her donation to the general government made them sovereign States; and since God gave the fruitful land of Canaan to Moses and Israel, such a gift of present and future empire has never been made to any people. Coming from the bosom of one of these States, can I forget the fealty and duty I owe to the supremacy of your laws, and sacred-

ness of your citizenship, or the sovereignty of your State? Rather may the child forget its parent, and smite with unnatural hand the author of its being."

This was his appeal for sympathy: "For my client I avow every sympathy. Fallen and undone, broken and ruined as he is by the fall, yet, from the depths of the fearful chasm in which he lies, I hear the common call which the wretched make for sympathy more clearly than if it issued from the loftiest pyramid of wealth and power. If He, who made the earth, and hung the sun and moon and stars on high to give it light, and created man a joint heir of eternal wealth, and put within him an immortal spark of the celestial flame which surrounds His throne, could remember mercy when executing justice when His whole plan of divine government was assailed and deranged; when His law was set at defiance and violated; when the purity of Eden had been defiled by the presence and counsels of the serpent, — why, so can I, and can you, when the wrong and the crime stand confessed, and every atonement is made to the majesty of the law which the prisoner has in his power to make."

Note his concluding appeal to the jury: "Shall I go home and say that in justice you remembered not justice to him? Leave the door of clemency open; do not shut it by a wholesale conviction. Remember that death is terrible — terrible at any time, and in any form. But when to the frightful mien of the grim monster, when to the chill visage of the glass and scythe is added the hated, dreaded specter of the gibbet, we turn shuddering from the accumulated horror. God spare this boy, and those who love him, from such a scene of woe. I part from you now, and most likely forever. When we next meet — when I next look into your faces and you in mine — it will be

in the land and before the Tribunal where the only plea that will save you and me from a worse fate than awaits this prisoner, will be mercy. Charity is the paramount virtue; all else is as 'sounding brass and tinkling cymbal.' 'Charity suffereth long and is kind.' Forbid it not to come into your deliberations; and, when your last hour comes, the memory that you allowed it to plead for your erring brother, John E. Cook, will brighten your passage-way over the dark river, and rise by your side as an interceding angel in that day, when your trial as well as his shall be determined by a just but merciful God."

Mr. Voorhees was the leading counsel in the trial of Mary Harris, tried in one of the courts of the District of Columbia, in 1865, for the murder of Dr. A. J. Burroughs. Burroughs was in the service of the government. He was twenty years her senior, and they had known each other since she was a child of ten. They were engaged, when he, without the least warning, informed her by letter of his intended immediate marriage to another. Shortly before this letter he had attempted to ensnare her into a house of ill-fame, in order that he might have an excuse to desert her, but his plans failed, she not being aware of his evil intention. Some time after receiving his announcement of his intended marriage to another, she went to Washington and shot him in the Treasury Building. The defense was insanity. The whole force of the government was thrown into the prosecution. The jury was out only five minutes; and returned a verdict for the defendant.

Voorhees' speech occupied several hours in its delivery. Perhaps it is his greatest speech. The defendant evoked his sympathy, and her pitiful condition drew forth his greatest oratorical powers. Here is a passage, and from the time of its delivery,

although it occurred early in the address, it was said her acquittal was assured:—"He had carried her to the highest pinnacle of happiness and hope. She stood upon the summit of joyous expectations, and all around her was sunshine and gladness. Well might she exclaim to my learned and eminent brother, as she paced her prison floor: 'Oh! Mr. Bradley, you should have seen me then; I was so happy!' Yes, though poor and humble, yet she loved and was beloved, and it was enough; she was content. For in that hour, when a virtuous woman feels for the first time that she possesses the object of her affection, there comes to her a season of bliss which brightens all the earth before her. The mother watching her sleeping babe has an exclusive joy beyond the comprehension of all hearts but her own. The wife who is graced by her husband's love is more beautifully arrayed than lilies, and envies not the diamonds of queens. But to the young virgin heart, more than all, when the kindling inspiration of its first sacred love is accompanied by a knowledge that for it in return there burns a holy flame, there comes an ecstasy of the soul, a rapturous exaltation, more divine than ever again to be tasted this side of the bright waters and perennial fountains of Paradise. The stars grow brighter, the earth more beautiful, the world for her is filled with a delicious melody. This, peculiarly, is woman's sphere of happiness. According to the evidence, she was up to that time the merriest and most joyous of her circle. The world, the glad earth, the opening day, the bending sky, and the kind faces of friends were all beautiful to her, and she enjoyed the few years of her unclouded happiness. But now the laugh was gone, no merriment kindled in her eyes; the future to her was dead; she lived in the past, and it was the

chapel-house of all her hopes, and over it bent the mourning cypress."

On the morning of Oct. 17, 1870, Harry Crawford Black killed Col. W. W. McKaig in the principal thoroughfare of Cumberland, Maryland. His trial for this offense began April 11, 1871, at Frederick; and for the prosecution appeared the Attorney-General and two able lawyers as assistants. In the defense assisting Mr. Voorhees was A. K. Syster of Hagerstown, Fred J. Nilson of Frederick, Lloyd Lowndes and William M. Price of Cumberland. Mr. Voorhees made the principal speech for the defense, consuming three hours and a half in its delivery. The accused was acquitted, the jury being out a little over one hour. McKaig had seduced young Black's sister, and then abandoned her. The defense was self-defense, for McKaig had threatened Black's life. Black's character, up to the day of the shooting of McKaig, had been excellent, and this gave Mr. Voorhees a fine opportunity to call attention to his conduct previous to that date, and ask if such a person could voluntarily be guilty of such a crime as murder. "Can the mark of Cain rest upon the brow of such a one? Can the ineffaceable hand of bloody guilt be there? Such an assertion is a perversion of all laws of human nature. The tree shall be known by its fruits; the thorn and the thistle do not bear delicious figs, and a life of innocence and peace does not bloom and ripen of a sudden into a harvest of atrocious crime." The picture of the wronged and desolate home (the young girl committed suicide) is a masterful sketch; and the allusion to the daughter of Jacob, seduced by a prince of one of the neighboring tribes, and to the conduct of Simeon and Levi in taking vengeance on the entire tribe, is most artfully put. His denunciation of the seducer was merciless: "And I

here, in this solemn presence, with the dread issues of life and death entrusted to my care, declare as far as my voice will reach, that he who invades the sanctuary of the home, imposes the impurity of his debased and brutal desires upon the presence of innocence, breaks the charm and halo of virtue, and defiles the altar of domestic life, forfeits his right of abode in the midst of human society, and deserves to die. The husband's hand is thrice armed for his destruction, the father rises against him in paternal majesty, and the brother may scourge him from the face of the earth wherever he is found. His offense is beyond the reach of pardon, and appeals to Heaven and earth combined for redress. It is ranked with crime and invites the lash of chastisement from every virtuous quarter." And of the fallen woman: "For the betrayed and ruined woman there is nothing left of life except the pain of living. The joy of existence never comes again. When we see the autumn leaf falling to the ground, and the white shroud of winter spread over the fields, we are blest with the certain hope that the soft air of spring will, after a little while, come back to us and renew in our midst the splendors of this beautiful world; that the fresh green sward, adorned with flowers, will again spread at our feet, and the deep foliage of the forest will weave its bright canopy over our heads. But to the soul that has loved, trusted, and lost, there comes no second spring. The solemn sky of autumn and the chilling winds of winter alone remain to her. No glad and golden summer awaits her in the future. A scorched and barren desert without verdure, without tree, or plant, or blossom, or shrub, or one single cooling fountain at which to rest in all the desolate pilgrimage, lies before her tired and faltering feet. She makes the rest of her journey, too, alone.

The leper's taint is upon her in the eyes of the world, and friends fall off and avert their eyes."

In 1884, Captain Edward T. Johnson, of Indianapolis, Ind., killed Major Edwin Henry near Greeneville, Tenn. Johnson was a man of slight figure, in a measure an invalid, and of a highly-strung, nervous organization. He had been a captain in the War of the Rebellion on the Northern side, was a lawyer and a man of fine culture and much ability, being particularly able upon the political rostrum. His home was in Indianapolis. He was employed in the government internal revenue service; and while in eastern Tennessee with his wife, Henry seduced her. Henry afterwards visited her in Indianapolis while Johnson was on duty in Tennessee. Mrs. Johnson had always borne an excellent reputation, and moved in high social ranks. Her gross violation of her conjugal duties so preyed upon her that she committed suicide. She wrote a letter to her husband confessing her guilt, and then dressing herself at her home as if for burial, and placing a photograph of her husband before her, she shot herself through the heart. After the funeral Johnson returned to Tennessee, and not far from Greeneville killed Henry, in the act of drawing his pistol to shoot him, by shooting into his body thirty-two buckshot.

These facts formed a fine setting for such an orator as Voorhees; and he was again triumphant, the jury having agreed to a verdict of "not guilty" within a few minutes after retiring, but remaining out twenty-four hours to avoid the charge of hastiness. Voorhees' speech on this trial has been criticized, because of several misstatements concerning what was the law, and it is open to the charge; but as an oration — as a play upon human feelings, as an appeal to the chivalry of man — few orations excel it. It

is replete with magnificent flights of oratory. Voorhees, however, was not always successful in defense, as one might hastily infer from the citation of the cases mentioned. In the case of the State against Nancy Clem, tried at Indianapolis for the murder of one Young, he met his match. There had been two convictions and both reversed by the Supreme Court, before Voorhees came into the case. His colleague was Major Jonathan W. Gordon, a man of high oratorical ability and a master of technicalities in the trial of a criminal case. But on the other side of the case was Benjamin Harrison, a man more than a match for Voorhees in the conduct of the case. Mrs. Clem was convicted a third time, when the case was again reversed, and thereafter the prosecution abandoned.

Mr. Voorhees was employed to defend William McKee, one of the participants in the great whisky conspiracy in St. Louis, in 1876. McKee was convicted, but received only a six months' sentence.

Senator Voorhees was leading counsel for Hallett Kilbourne in his case against John G. Thompson. Kilbourne had refused to answer certain questions asked him by a committee of the National House of Representatives, was adjudged in contempt by the House, and imprisoned. He was released, pursuant to a decision of the Supreme Court, upon a writ of *habeas corpus* sued out in his interest. He then, in 1883, sued Thompson, who was the Sergeant-at-Arms, for damages. The first trial resulted in a verdict of \$100,000; which was set aside by the Court, because too great in amount. The second trial resulted in a verdict of \$60,000; and this was set aside for the same reason. On the third trial there was a verdict of \$37,500, when the court informed counsel that, if they would remit \$17,500, the plaintiff could have judgment for the remainder. This was

done. The case involved a discussion of personal liberty, and the right of the individual to be free in his person and papers from search. It was one that greatly appealed to Senator Voorhees' sympathy. The great size of the verdicts was largely due to his addresses, which were the closing speeches to the jury.

Senator Voorhees' great speeches were delivered in defense of persons charged with having committed crimes; and in these instances he was strongest where the outraged defendant had taken the law into his own hands to right a wrong inflicted upon him or upon his family, such as the case of Miss Harris, Harry Crawford Black, or Captain Johnson. In Congress he always stood in the very front ranks as an orator, both in the House and in the Senate.

Voorhees was an ultra-Democrat. He was at war with Lincoln's administration; and he made many bitter speeches against it and necessary measures adopted during the War of the Rebellion. He rather belonged to the branch of the party led by Vallandigham of Ohio; but his timidity held him back from the extreme measures adopted and language used on public occasions by Vallandigham. It was repeatedly charged in public and private that he was a rebel sympathizer, and was connected with a treasonable secret order called "The Knights of the Golden Circle." If Senator Voorhees had been heartily in sympathy with the administration, and the cause of the North, he would have been a much greater power on the rostrum during that period. In the House during the War of the Rebellion, he led a forlorn hope in the ranks of the minority against an overwhelming majority, opposing many of the great war measures that it was indispensably necessary to adopt. Senator Hendricks occupied a similar position in the Senate at the same time. Nevertheless, a speech he delivered on May 21,



1862, in opposition to the policy of the Administration, is considered a model of Congressional oratory.

Voorhees had a great hold upon the masses of the people. Reared on a farm, and having a deep insight into human nature, he was able to appeal with great force to the electors of Indiana, nine-tenths of whom were of the country and small towns. Although a remarkably successful politician, so far as to keep himself before the people and in office, he yet was not a great political general. Others did the planning, and he carried the plan through by his appeals to the electorate from the public rostrum. He was always counted upon to wield a certain amount of influence; and he did it without fail. He was greatly beloved by those in the ranks of his own party, and had not a few admirers in the ranks of the opposition, so much so that not a few supported him quietly in his races for the lower House of Congress. In 1876 his party imposed upon him a great task. It had nominated James D. Williams for Governor. Williams always wore in public life a suit of blue "jeans," and was popularly known throughout the canvass and while Governor as "Blue Jeans Williams." He was no speaker, had none of the graces of an orator, or, indeed, of a public man. Benjamin Harrison, against his will, made the race against him. Voorhees was selected to accompany Williams in his canvass, and to make the speech of the day. It was an adroit combination. The Granger craze was yet in the air, and Williams appealed to it strongly; while Voorhees knew well how to hold it in line and instil enthusiasm into the ranks of its votaries. His canvass of the State was a magnificent one, leading his party to a triumphant victory.

Senator Voorhees delivered a number of addresses upon subjects not of a political or

legal character, — such as the "Holy Sepulcher," "Thomas Jefferson," "Public Men of my own Time" (never delivered, in course of preparation at his death), "Influence of the Physical Sciences on the Progress of Civilization," "Magna Charta" (before the State Bar Association of South Carolina, in 1892), "The Flag of the Sea" (at the unveiling of Farragut's statue in Washington, 1881), "The Louisiana Purchase, and the South-land of the Republic" (at Memphis, 1892), "The American Citizen" (at Virginia University, 1860), "A Tribute to Judge Huntington" (of Indiana).<sup>1</sup> These addresses fall far below the other speeches referred to in this article.

Senator Voorhees was not a phrase maker, like Samuel J. Tilden or Benjamin Harrison. Harrison's speeches abound in many sentences that are quotable; but a compiler of a book of quotations will find few sentences at his hand in Voorhees' speeches and addresses. He was eminently a rhetorician. A quotation from his speeches must usually and necessarily be a page or a half page in length, and often more. Occasionally, however, one meets with a striking short sentence. As for instance: "The possession of power is like the tiger's taste of blood, it is not to be permitted." Or, "Liberty is said to be brightest in dungeons, for there its habitation is the human heart." Or, "Each one of these homes is a beacon-light of civilization." Or, "Death is no calamity, if we die with a good name; but let dishonor once come to follow us over the world like a hissing serpent, and neither in life nor in death is there peace or

<sup>1</sup> There are two collections of Senator Voorhees's addresses and orations, one published by Robert Clark & Company, Cincinnati, edited by his son, Charles S. Voorhees; and the other (two volumes) by the Bowen-Merrill Company, Indianapolis, 1898, compiled and edited by his three sons and his daughter, Harriet Cecilia Voorhees. The latter work contains some orations inserted in the first volume.

rest." Or, "The surrender at Appomatox illuminated the Republic from ocean to ocean; Lincoln died in the light of a national jubilee, himself the chief instrumentality of what had been done." Or, "We hear the siren voice of the moment, but fail to catch the loftier harmony of the eternal spheres." Speaking of the return of the Southern States: "Those wandering stars from the azure field of the flag, those discontented Pleiades that shot madly from their spheres, have one by one re-illuminated their rays at the great central light and glory." Or, "The tree shall be known by its fruits; the thorn and the thistle do not bear delicious figs, and a life of innocence and peace does not bloom and ripen of a sudden into a harvest of atrocious crime."

But for smoothness, for diction, and for picturesqueness few in our language excel him. His periods have the easy flow of Gray's "Elegy," or of Longfellow's writings, rather than the fire of Byron, or the majesty of Pitt or Webster. His favorite book was the Bible, which he read almost daily, and from which he not only drew many illustrations, but frequently quoted at length. Voorhees was a man of striking appearance, of a florid complexion, and slightly over six feet in height. He had a magnetic presence, to an unusual degree; and his movements in speaking to an audience or jury were a pleasure to behold. His voice left nothing to be desired in an orator. One of his lawyer friends has said that a stranger, standing within the sound of his voice, but too far away to distinguish his words, could not help being charmed with it, and with the grace of his gestures and demeanor. He possessed a clear and penetrating insight into human nature, which served him well, not only in addressing popular audiences, but in arguing a case before a jury. His

power over juries was so great, and his triumph for the defense so frequent in criminal cases, that it became almost a proverb in Indiana, "Where Voorhees speaks there will be a verdict for the defense." Previous to 1873 the defendant in criminal cases in Indiana had the closing argument, but in that year the law was so changed that the prosecution had the first and last addresses to the jury; and this was brought about almost wholly because of the many triumphs of Voorhees.

No one who had a just regard for the truth and his word, and who knew what he was saying, ever claimed that Senator Voorhees had ever a broad or a deep knowledge of the law, or, in fact, an accurate knowledge of it. Perhaps, in the last years of his life he never seriously looked into a law book. Others gathered the evidence and planned the fight; he made the speech. He was not a close student of the law, perhaps, even in his early career as a lawyer. Few lawyers of his cast of mind and command of language ever are. The claim has been made by some of his friends that he possessed great learning; but such expressions must be regarded as emanating from the exuberance of admiration rather than from the strict lines of truth. That he possessed a fund of information far in excess of the ordinary individual, is not to be doubted; but to say that is very far from saying he possessed great learning.

He was generous far beyond his means. The poor over-excited his sympathies; and his friendships never ceased to draw dollars from his pockets to spend in the entertainment of his friends. His heart was large, indeed, very large; his designs impelled by good intentions. His fees were often very great, and his income from his practice at times was quite large in amount; but he died a poor man, leaving to his family only

his speeches and the legacy of his name and fame. He died April 10, 1897, at Washington, a little over a month after his term as Senator had expired. "His nature," said one of his close friends, "was too kindly for either good or evil to take deep root." "He was the product of the time when oratory accounted for more than it does now. And surely if nature ever gifted any man in that way she was prodigal of her equipment of him. In the prime and vigor of his young manhood he had everything that went to make the popular orator. Of magnificent presence, with a natural flow of speech, bewildering in its color and strength; with a voice like the music of the spheres, unhampered by intellectual restraint, a nature that floated on its feelings, giving form and shape to the emotions of the day or the hour or the moment, he could so entirely work his

will as a born mathematician could handle figures."

A lawyer friend, who had known him for years, has said: "Of him it can be correctly said he was a lovable man. His nature was so sensitive and emotional, that the pleasures and pains of his fellowmen were, in fact, his pleasures and pains. His great heart had an inexhaustible sympathy for those in joy or those in sorrow. In every phase of his character were plainly exhibited the large generosity of his mind and heart. His intellect seized upon a question with most remarkable quickness, and with a most comprehensive grasp, and a cause once espoused became part and parcel of the man. His fervid and effective oratory was natural and spontaneous. It was the product of a brilliant intellect and a highly sympathetic, emotional nature."

## THE LAW AS TREATED IN FICTION.<sup>1</sup>

BY ALLAN R. CAMPBELL.

ANTHONY TROLLOPE, towards the end of his novel, *Doctor Thorne*, interrupts the narrative to state and solve a problem. To bring his story to the proper ending he would like to make use of a certain proposition of law; but, doubting the soundness of this proposition, he would avoid the criticism of lawyers. He has rejected, with apparent disdain, the plan of referring the matter to a barrister beforehand, and he now invents a device of his own, by which his accuracy in stating the law is protected from any possible impeachment. He writes, simply:

"If under such a will as that described as having been made by Sir Roger, Mary

would not have been the heiress, that will must have been described wrongly."

Despite the success achieved by this sentence, it is believed that the writing of it was a literary fault; as truly such as the following surprising statement found in another of Trollope's books: "Andy Scott came whistling up the street with a cigar in his mouth." The anomaly described here could hardly be remedied by requesting the reader to imagine Andy Scott physically capable of the feat set down to him; for Trollope is said to be a realist. Now the same literary defect exists where the anomaly is one of law. The duty of making the fiction complete should not be shirked or shifted to the reader.

The only other way suggested of avoiding

<sup>1</sup> Delivered as a Commencement Part at Harvard University, June, 1902.

legal pitfalls is to advise with a lawyer. Are such means worth the trying?

They were tried, to the knowledge of the public, in two books, Sir Edward Bulwer's *Night and Morning*, and George Eliot's *Felix Holt*. Each, in matters of law, is founded upon a rock. On the other hand, one might fill a library with fiction in which this or that assumption has been made, so utterly at variance with the actual state of the law that the mistake could not have passed any lawyer's censorship. George Eliot, for example, seems to have abandoned the *Felix Holt* plan when she came to write *Middlemarch*. Recall, if you please, the death scene of the miserly Featherstone. Having made two wills, the second purporting to revoke the first, he has preserved both documents, and on his death-night commands Mary Garth, who attends him, to destroy the second in order that the first may revive. Mary Garth refuses, and the second will takes effect. Mary Garth feels, vaguely, that she has wronged those who would have taken under the first will; but her disquiet is smoothed away by assurances, coming from lawyers, that that will could in no event have been validated by her tearing up the other. The lawyers' reason was presumably that the first will was, by the making of the second, absolutely revoked,—dead forever. Such was the English rule when *Middlemarch* was written.<sup>1</sup> The law up to the Wills Act of 1837, however, was just the other way,<sup>2</sup> and it is that law that is important, for, by the story, Featherstone's death came before the Reform Bill of 1832 was passed. Mary Garth's informant, therefore, showed the traits rather of a prophet than of a lawyer. That she may later hear the law correctly stated and begin to suffer anew is naturally a source of pres-

ent anxiety in the reader; and this result, from a literary point of view, is unfortunate.

In *Peregrine Pickle* there is a mistake. When Peregrine's father disappointed Peregrine's mother by dying without a will, Peregrine, their first born, inherited, it is said, all his father's estate of eighty thousand pounds. Since this eighty thousand pounds was all personal property, it should by the English law have gone a very different way,—one-third to the contriving mother, and of the remainder equal portions to the children,<sup>3</sup> who were three, counting Peregrine. So that of the fortune he cast into the lap of Emilia, his bride, but two-ninths were lawfully his to cast.

An excellent example of a legal difficulty entirely overlooked is a short story published last year in a collection called *A House Party*. *Artemisia's Mirror* is the name of the story, which, dismantled of much of the incident which makes it delightful, is this. Artemisia's grandfather, when young, had owned a great patroon estate in New York. A fire burned the mansion, Grandsir's title-deeds were lost, and Grandsir, lacking proof of his right, was turned out by his brother, who claimed by descent. He saved from the fire and from his brother a single heirloom, an antique Italian mirror. When he died, long afterward, with no one left to him but Artemisia, this mirror was in his hands. It fell to the floor. The glass broke, and out from behind tumbled the lost title-deeds. "Safe, these fifty years, lay Artemisia's fortune," cries the writer. Enthusiasm has led him astray. True, the deeds showed that Grandsir when he was turned out really owned the property, but in the long meantime the grasping brother had held adverse possession, the first twenty years of which, by

<sup>1</sup> Stat. 7 Wm. IV. and 1 Vict. c. 26, § 22.

<sup>2</sup> Goodright d. Glazier v. Glazier, 4 Burr. 2512.

<sup>3</sup> Lovelass *Disposal of a Person's Property who dies without Will or Testament*, 12th ed., p. 137.

virtue of the Statute of Limitations, must have cured his defect in title. This title could not now be defeated by the discovery of new evidence. Artemisia should have our sympathy, for she was without remedy.

Many similar mistakes might be mentioned, but these are enough, perhaps, to show that to write fiction without seeking legal advice is highly dangerous. They all betray, not misjudgment, but neglect of the law, the usual source of error where the legal question is involved incidentally or has crept in without the writer's seeing it at all. There is a special class of fiction, however, where the interest is directed chiefly to the curious operation of some particular rule or rules of law. Here, to state and apply these rules correctly is all-important; but the writers who attempt this sort of thing, usually men who have had some legal schooling, are frequently lost in their own mazes.

Perhaps the most ambitious book of this sort is *Ten Thousand a Year* by Samuel Warren, barrister and physician. It tells of a miserable draper's clerk, Tittlebat Titmouse, who is caught up by some crafty solicitors and proved by them to be entitled to a large English estate. The narrative is saturated with law. In a detailed report of the great law suit pedigrees are charted and many points resolved. A plain reason appears in the facts, however, why Tittlebat Titmouse should not have won. His claim, like that of Artemisia of the Mirror, was outlawed. It had come to him from his great-grandfather, who had been put out of possession seventy years before. A claim to land, as we have seen, becomes unenforceable if not asserted within twenty years after it first arose. Dr. Warren disposes of this objection by mentioning exceptions in favor of claimants who are infants, married women, or beyond seas, and by showing that Tittlebat's ancestors, one after another,

were under this or that so-called disability. These exceptions, however, exist only for claimants who are disabled when the claim first arose.<sup>1</sup> At that time the claimant was Tittlebat's great-grandfather, and he was beyond seas; but when he died, leaving a daughter two years old, then, by the authorities, was there an end of disabilities. This two-year-old daughter was Tittlebat's grandmother; and Tittlebat, therefore, bringing suit at twenty-seven, was of course too late.

Dr. Warren relied, possibly, on a *dictum* of Lord Mansfield<sup>2</sup> uttered shortly after the supposed date<sup>3</sup> of this fictitious decision. Such reliance can hardly be justified, for by the time the book was written<sup>4</sup> that *dictum* had been generally discredited.<sup>5</sup>

Another barrister to devote his law to fictitious uses is Rider Haggard. In *Mr. Meeson's Will* he assembles upon an island four castaways, to wit: a beautiful and tender-hearted young woman, two sailors, and a dying millionaire who is anxious to make a will in favor of a worthy nephew hitherto neglected. For lack of writing materials the tender-hearted young woman submits her back to a testamentary tattooing by one of the sailors. The dying millionaire signs by awkward, painful thrusts, and both sailors witness. The young woman, thus inscribed, returns to England, and is admitted to probate.

<sup>1</sup> Stat. 21 Jac. 1. c. 16 § 2; *Griswold v. Butler*, 3 Conn. 227; *Thorp v. Raymond*, 16 How. (U. S.) 247.

<sup>2</sup> In *Cotterell v. Dutton*, 4 Taunt. 826, 830 (1814).

<sup>3</sup> The book states that Tittlebat was about two years old at his mother's death, which preceded his father's by some five years, the latter's occurring in 1793. By reckoning in the statement that Tittlebat was twenty-seven when he sued, the date of the decision is approximated at 1813.

<sup>4</sup> It came out in *Blackwood's Magazine* beginning October, 1839.

<sup>5</sup> *Blanshard, Statutes of Limitations*, p. 22 (1826); *Griswold v. Butler*, 3 Conn. 227, 244 (1819); (see also 2 Preston, *Abstract of Title*, 2d ed. p. 341 (1824) with reference to the Statute of Fines, which has similar language to that of the general Statute. See *Blanshard, supra*, p. 19. Further decision has been prevented by the express provision for this point in Stat. 3 and 4 Wm. IV. c. 27.

Beneficiaries of an earlier will offer resistance, but despairingly; and here the tale grows too unreal. Good argument might be made against her validity as a will. Parliament has enacted that a will must be in writing. What does "writing" mean? Not every sort of script will do. Finger tracings on a dusty surface could hardly constitute a will. A dying Roman soldier, it is written, might scratch a will in the sand with his sword, but this was because he was a soldier and not because he satisfied the ordinary forms nor because of the general necessities of the situation.<sup>1</sup> Suppose we refer to the authorities to interpret the word "writing." The early English law, before wills, as we know them, existed, required deeds to be in writing.<sup>2</sup> For a deed, it was thought, should be durable and reliable for reference. Since many inscriptions might fail utterly to serve these purposes, Coke and Blackstone declare, apparently by way of corollary to the rule just stated, that the writing must be on paper or parchment else it is no deed.<sup>3</sup> Nothing has been found in the books to establish the law in this respect as otherwise to-day.<sup>4</sup> Since the functions of wills

and of deeds are much the same, the rule determining what material should hold the writing should apply indifferently to both. In fact, in the case of Reed against Woodward, eleven Philadelphia Reports, page 541, it was decided that a will cannot be written on a slate. Now tattooing cannot outlast the life of the tattooed, nor is it readily available for reference, nor capable of being filed. So, at least, the losers might have argued, but instead they gave up the chance of millions without an appeal.

The plan of books like these was more perfectly executed by Wilkie Collins in *No Name*, a well-built narrative founded on much good law. The author has wound safely through intricacies in the law of marriage, of wills, of descent, and of trusts. He carefully avoids legal dispute by throwing in enough facts to bring him well within the protection of such rules of law as he can be sure are indisputable. Altogether, he sets an instructive example. Novelists, by exercising freely their absolute control over their facts, should never have any difficulty in choosing safe legal ground.

All these things considered, it would seem fair to judge them by the rule that ignorance of the law is no excuse for their misdeemeanors.

<sup>1</sup> See 1 Phillim. 29 and note b.

<sup>2</sup> Co. Lit. 35 b.

<sup>3</sup> Co. Lit. 35 b, 229 a; 2 Bl. Com. 297.

<sup>4</sup> See Geary v. Physic, 5 B. & C. 234; Clason v. Bailey, 14 Johns. (N. Y.) 484, 491; but see 13 GREEN BAG, 567, ¶ 4.



## QUAINT EARLY ENGLISH SOAP LAWS.

BY L. G. SMITH.

THE making of soap was first begun in London about the year 1542, that used in England previous to that time having been imported from the Continent. One wonders that any manufacturer of concentrated cleanliness had pluck enough to set up his shop on English soil, so strict were the laws and regulations which governed the business at that period. At no hour of night or day was he free from possible visitation of a limb of the law in the form of the Excise Commissioners.

During the reign of George III., 1760-1820, the laws governing the soap industry were particularly stringent. Every soap-maker was required annually to take out a license, for which he paid two pounds, and no person within the limits of the office of the excise in London was permitted to make any soap unless he occupied a tenement for which he paid ten pounds a year.

That it was the intention of those early jurists to emphasize the close connection between cleanliness and godliness is evidenced by the law no one in England outside of London could make soap unless he paid his tithe to the Church and the poor.

Certain duties were imposed on all soaps made in Great Britain and all places for making it were entered in the public books. The furnace door and the utensils used in

its manufacture were locked up by an excise officer as soon as the fire was damped or drawn out after a boiling. The penalty for opening or damaging these locks was one hundred pounds.

Officers were required to inspect the premises at all times of the day and night, and any owner obstructing this examination was fined fifty pounds. The officer could unlock and examine every part of the outfit between the hours of five in the morning and eleven in the evening.

The penalty for privately making soap was one hundred pounds, and owners of houses where it was done were held liable to the extent of two hundred pounds. If a person withheld soap from inspection, he forfeited the same and was fined five hundred pounds.

Every barrel of soap must contain two hundred fifty-six pounds avoirdupois, and the maker was obliged to enter weekly in writing at the public office the amount of soap made, with the weight and quantity of each boiling. He was also required to keep just scales and weights for use in weighing the soap, and permit and assist the officer to use and test the same, on pain of ten pounds; and if he falsified the weights, the penalty was one hundred pounds.

Verily the life of the London soap man was not a happy one.



## THE MARKET VALUE OF SPEECH.

BY WM. ARCHIBALD MCCLEAN.

THE wisdom of all ages tells how speech may do superlative harm. The vast majority of men owning good names would rather feel the knife or bullet in the physical body than the sting of the stain of a venomous tongue upon a fair name. It is those who have lost the possession of a good name who frequently not only love company but also know better than others the price of the sting of their efforts to get company. To utterly destroy a good name for mere purposes of wrecking, for that is all it ever amounts to, is the work of satanic meanness and often brings the victim irreparable injury.

In this light the offense of the slanderer should be punished in the very highest financial terms, for a good name is rather to be chosen than great riches. Yet the reverse seems to be the rule with juries. The market value of a slander seems to be low. It is a cheap thing in the eyes of juries. Judges often condemn the act in the severest of language, yet the verdicts do not seem to be in proportion to the condemnation. There may be many explanations for this.

Perhaps juries become more preoccupied with the slander itself than the injury done and its value. Perhaps the good name before the end of the trial grows suspicious, not enough suspicious to say the owner was robbed of nothing, yet enough to question the value of it. Perhaps an allowance is always made for the thoughtless talk of the world, which is not really meant. Perhaps the robbing has been done by one possessing the most brazen of tongues, so that unconsciously there enters into the deliberations of the jury the thought that the source of the slanderous injury could do little harm to any one else

than its author. Perhaps the circumstances suggest that the one slandered is more anxious to acquire money he is hard up for than about his good name. Whatever the reasons may be it seems to be true that the verdicts of juries for the loss of good names do not bring great riches.

It might be hurriedly concluded that in a land where freedom of speech is guaranteed in its constitution, the citizens would value lightly any curtailment of speech. This, however, is no explanation, for the act of the slanderer has nothing to do with liberty of speech. It is not a liberty he enjoys, but a license he takes at his peril. He has a right to the air he breathes, but not to pollute and foul that which he does not use to the injury of his neighbor. He has the right to open his mouth and wag his tongue as much as he pleases, even though he may display his own mental smallness, provided in the act he does not mentally tramp upon the toes of others, provided in the enjoyment of his rights of speech he does not injure his neighbor. In so much as injury is done his neighbor, he must suffer for his acts.

When the market value of speech comes to be considered as expressed in dollars and cents, for many get down to a few pennies, it is necessary to keep in mind the legal definition of the two-headed monster—slander. First, there are words, falsely spoken of a person, which impute to the party some criminal offense, involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. Such words are actionable *per se*. The utterance of them necessarily imports injury. The proof of the words will be proof of the damage.



In such cases the jury assess the damage on a guess as to the value of the injury done the good name. The words, the circumstances under which they were said, what they mean, the one who spoke them and the one to whom they are said are considered, and injury is estimated in good conscience and aggravating circumstances are specially punished. Second, there are words not actionable in themselves, which do not impute some criminal offense, but which have been uttered so that injury followed the utterance. In such cases the injured party must prove the loss or damage he has sustained thereby, and the market value of the words is estimated and determined from the evidence of the value of the injury sustained. In either way, the legal market value of speech expressed in dollars and cents is arrived at.

In many States there are laws which fail to provide for the occupation of tramping, hence to be a tramp and beg for daily bread is to be an outlaw and an outcast. In such States it would be a disgraceful name to apply to any one who supposed they moved in some other strata of society. We are all travellers, but not every traveller is a tramp, or as the latter might express it, not every tramp is a hobo. Of course it would be a far greater injury to a woman, whose social ambitions frequently outrank and outclass those of men, to be called a tramp. At any rate, the value of calling a woman "you are a vagrant" was rated at \$100. If the plaintiff had been a man it is dollars to doughnuts the verdict would have been six cents.

Many of us would rather be spendthrifts than misers. There is the semblance of more humanity and heart about him who scatters than him who hoards. Notwithstanding this, it will do more material harm to be called a spendthrift than a miser, for the

former is a reflection upon one's business methods and the rating to be given his credit, while a miser's financial rating is assured. Hence when it was said, "The sheriff will sell him out one of these days and claims against him not sued on will be lost," the remark was listed at \$45.

Smuggling is only a *mala prohibita*. According to popular ideas the American is supposed to be an adept at the *prohibita*, holding it no disgraceful thing to try to get foreign goods into the country without the payment of duty. The only disgraceful thing about it is to be caught, to find out that one was not as smart as he thought he was. However, when it was said he "had a room in which were two beds and both beds were full of leather he had smuggled away at the time of appraisement," the speech was put down as worth \$100.

As long as there are two men on the face of the earth, so long will there be disputes about line fences, for there is nothing a mortal loves better, from the time of taking title until his dying moments, than to insinuate that he was entitled to a few more metres of ground than he had. Where it was said, "He moved the line and he made a new line," in a conversation about boundary trees and landmarks, it was scheduled at a fire-sale price of \$6. However, where a somewhat similar remark was coupled with the aggravation, "Be a man, or a monkey, or a long-tailed rat," it was knocked down at \$500.

When it comes to paying for your slanders it would seem to be cheaper to do it boldly on your own hook than Adam-like to lay it at the doors of an anonymous another. A jury will give you more consideration if they can look straight at you and will not have to follow you around a corner to get a glimpse at you. "If I have not been misinformed, the plaintiff had a bastard child,"

was quoted at \$1,000. One naturally would suppose that the color of the child would add to the value of the remark, yet the words, "Mrs. M— before her marriage had a mulatto child," went at the same figure. Questions involving chastity are the burdens of many slanders and are usually quoted in three and four figures. While a remark that a married woman had "illicit carnal intercourse" with a man not her husband, was listed at \$750, yet where there was a fuss between neighbors over their children, and compliments were exchanged, among them, "It aint forgotten what you did at Rome city. The conductor that had you out on the island all day is right here. He will prove it and so will I," was a bargain-day sale of goods and went for 6 cents. Perhaps the jury resented the bad grammar.

It is usually cheaper not to call a man a thief. People do not hunger for the appellation, juries do not justify the word unless the proof is clear that the party was rightly so called. Just a plain "thief" went for \$400, "a damned thief" at \$1,000, for of course it was worse to be a damned one than a plain, ordinary, unemphatic one. "A scoundrel, a rascal, a damned rascal, the property he owns he has stolen," was given \$300. "He stole a bolt of cloth," went for \$670. "You stole my belt, you have stolen my belt, you might as well have stolen my belt, as you broke open two trunks two years ago," was put at one of those fashionable figures of a few cents less than whole dollars—\$212.50. The cheapest price seems to be for a charge that one stole cattle and received such cattle knowing them to be stolen, as it went at the bargain price of \$1. On the other hand, "Now I want to say something and I want the reporters to get it. The superintendent of streets is a downright thief and I can prove it," went for the top-notch price of \$5,000,

to be upset, however, in the court of last resort for other errors in the trial than those that involved prices.

Arson brings a little more than an ordinary figure. "He burned the gin house of A" cost \$1,500, and when a landlord said of a woman tenant, "This is twice you have tried to burn us out to get your \$1,400 insurance," the charge was \$1,200. A remark charging a similar offense was, however, marked down as low as \$200 when it was qualified, "I had every reason to believe that he burnt the barn. From the evidence I had concerning the burning of the barn I believed that he had burnt the barn."

"He has sworn falsely and I will attend to the grand jury respecting it," brought \$250, a charge of being a rascal and of false swearing, \$500, a charge of forgery \$450, "He was a negro," \$500, and "What are you doing with that nine-dollar black-mailer here?" \$1,300.

When one had valiantly fought for his country and returned with the honors due a veteran, it was extremely disgraceful to have it said, "He lay drunk all the time he was in the army, and in Sherman's March to the Sea he had a negro wench for his waiter and slept with her every night." Of course the jury was shocked at such horrible language, and when it was measured found it footed up a cost of \$700.

There is one case which is comforting to those who have slanderous moods. The words were, "He stole my dog," and the verdict was for \$37. It must have been some other than a common, dirty, yellow mongrel dog. The court of last resort set aside the verdict, for the reason that a dog is not the subject of a larceny, and hence to say he stole a dog was no slander because it did not impute to the party some criminal offense involving moral turpitude for which the party could be indicted and

punished. This would admonish one that when he is provoked to slander, to say of his neighbor, "He's mean, so mean that he steals mosquitoes out of my yard," the words will have no market value, for it is no larceny to accuse one of the stealing of these animals *naturæ feræ*.

It is interesting to note, when it comes to this matter of speech, it is the rule that there should be no variance between the *allegata* and the *probata*. In other words, if you sue in an English-speaking court and the speech being inquired into was in German, French, Spanish or any other tongue, it will not be sufficient to allege a translated speech and prove the translation, for it has been held that where slanderous words were spoken in a foreign language, they must be set forth together with a translation into English. To set forth the foreign words alone will not be sufficient, and to allege a publication of English words and prove a publication of words in another tongue is a variance. To charge a person with a slander in English, does not inform him that he will be required to meet and defend words

uttered by him in a different language. There is nothing to indicate that any money will be saved in the market value by uttering the words in a foreign language, for some one else may understand them and therein would lie the publication and value, unless it would be in some gibberish that no one could understand.

In conclusion, great riches do not come in the buying and selling of slanderous words. It cannot be coaxed and coddled with unseemly language. It simply flees and tantalizes with an imagined nearness. Of course, if the one who has been slandered insists upon what is called his or her rights, the jury will give it to them in dollars and cents, the public will discuss the pros and cons no matter how the jury goes, and the lawyers will want their fees, whether there are rights or no rights. The last state of that man or woman will frequently be much worse than if the cheap slander would have been dismissed with a shrug of the shoulders as not worth its weight in the coin of the realm, and as doing the publisher more harm in the end than the one aimed at.

### THE MARSHALL MEMORIAL TABLET.

BY MARIA NEWTON MARSHALL.

THIS latest tribute to the memory of John Marshall has awakened in the public that peculiar interest that always attaches to the marking of the birthplace of a great man. Familiar enough to the reader and tourist are the country-seat and town house so closely associated with Marshall's private life,—“Oak Hill,” the old homestead among the foothills of the Blue Ridge, in Fauquier County, Virginia, built by his father before the Revolution; and the colonial mansion on the corner of Ninth and

Marshall Streets, Richmond, erected by himself a few years after he had settled in that city for the practice of law.

But though these halls may ring with his fame, and frame for us many a picture of the man in his stirring youth and maturer years, a humbler abode enjoyed the distinction of having been the birthplace of “the great Chief Justice” and his home during the first ten years of his life.

On Licking Run, near Germantown, in the County of Fauquier,—in the angle made

by the intersection of the Southern Railroad and the old stage-road from Warrenton to Fredericksburg,—stood for many years a plain log house, built in 1754 by Colonel Thomas Marshall for his bride, the daughter of the scholarly James Keith, Rector of Hamilton Parish, Virginia. Those were strenuous times in the Old Dominion; and on this the eve of the French and Indian War, the settlers of the frontier counties had an eye to strength rather than elegance in the construction of their homes. But a rough exterior was by no means an invariable index to the home-life within,—which in many cases was marked by all the refinement and culture of the earlier and prouder homes of the colony. Of such a character, indeed, was the humble dwelling in which, September 24, 1755, John Marshall was born.

In the course of years this old log house—long a landmark—went the way of its kind; but the chimney lingered upon the scene, sentinel-like, to guard the site of Marshall's birthplace, till at length it fell to earth, forming a little mound which the years have covered with softest green. But always there have been those who have held the historic spot in remembrance, and the little knoll has never lost its identity.

It has remained for the Marshall Chapter of the legal fraternity of Phi Delta Phi to mark the spot for future generations; and on May 30, 1902, the foundation-stone for a simple monument was laid, by a deputation from the Chapter, with impressive though

simple exercises,—the more elaborate ceremonies having been reserved for the occasion of the unveiling of the Memorial.

The site of the fallen chimney forms the fitting base of the pyramid of stone, which, with its memorial tablet and further inscriptions, will so appropriately mark the place of Marshall's birth; while the monument—which is to be of native sandstone—upon an eminence several hundred yards east of the railroad bridge that spans Licking Run, may be distinctly seen from the passing trains.

In thus honoring the memory of Marshall, the Phi Delta Phi have signally honored themselves. This fraternity, the founding of which dates back to 1869, was the first of the legal fraternities in this country; and the John Marshall Chapter began its existence exactly fifteen years later.

The oldest Greek letter fraternity in the United States—of which, as may not be generally known, John Marshall was himself a member—is the Phi Beta Kappa. It had its origin at William and Mary College, when the Revolutionary War was at its height. It is interesting to read upon the old records, under date of May 18, 1780, that "Captain John Marshall"—he was at that time a student of law at William and Mary—"being recommended as a gentleman who would make a worthy member of the Society, was balloted for and received." Great prestige is enjoyed by this now famous Society, which has been styled "an admirable nursery of patriots and statesmen."



## PIGS.

BY R. VASHON ROGERS.

**M**R. IRVING BROWNE, who for several years so ably filled the Lawyer's Easy Chair of THE GREEN BAG, was fond of dilating on the animal kingdom in court, but he does not appear to have given the porkers that attention to which their numbers and prominence before the law entitle them. Moses and Mahomet legislated against them, the German barbarians of early Christian days and St. Patrick passed laws for their protection, and the jurists and judges of the Middle Ages treated them like men and brethren, letting the skirts of the mantle of Justice fall over them if they transgressed; they have raised serious political questions, and have caused peace to shudder.

During the dog-days it may be well to think about them while we recline at our ease in country homes within sound of their familiar voices.

Sir James Stephens remarks that it often seemed to him singular that in proportion as we go back in legal history, the law becomes more and more technical, intricate and minute in its details and more and more vague in its general principles. This, as Professor Ferguson points out, is because in the earlier days, the rules of life were not recognized as general principles leaving room for freedom of action in detail — there was no idea of systemising: each injury inflicted, each crime committed, stood as an isolated fact and had its own penalty. The learned Professor sustains his position by quoting the Salic Law on the subject of stealing pigs. The Salic Law existed in the fifth century, and the Salians composed the chief tribe of that conglomeration of Teutonic peoples known as the

Franks. Its best known provision was the one which excluded women from inheriting real estate or succeeding to the thrones of their ancestors. However, it did not only deal with such lofty subjects as thrones. Thus it lays down the law anent swine:

(1) "If anyone shall have stolen a sucking pig and it shall be proved against him, he shall be fined (*culpabilis judicatur*) 120 denarii, which make 3 solidi. (2) If anyone shall have stolen a little pig from the field, which could live without its mother, and it shall be proved against him, he shall be fined 40 denarii, which make 1 solidus. (3) If anyone shall have stolen a one-year pig, and it shall be proved against him, he shall be fined 120 denarii, which make 3 solidi. (4) If anyone shall have stolen a pig two years old (*porcum bimum*), he shall be fined 600 denarii, equal to 15 solidi. (5) Which fine it will be well to observe in regard to two pigs. (6) If, however, he shall have stolen three or more, he shall be fined 1,400 denarii, equal to 35 solidi. (7) If anyone shall have stolen a pig from his sty (*de intro*) he shall be fined 600 denarii or 15 solidi. The same minute rules prevail here as prevailed in the case of the pig stolen *de campo*. Then the law goes on to draw a distinction between the stealing of a sow and a boar. If the hog should have been gelded and thus prepared for sacrifice, the fine was 700 denarii. If, however, it could be proved that it was not intended for sacrifice, then the fine was 600 denarii. If the thief should steal twenty-five, which should be the whole number in the pen, he should be fined 2,500 denarii. If, however, there should be more in the pen, then the fine was only 1,400 denarii. If

fifty should be stolen, the fine was still apparently 2,500 denarii." (Professor Ferguson's *Development of Law*, 63 Alb. Law J. 419.) A denarius was about fifteen cents.

The celebrated Brehon laws, in force in Ireland probably a thousand years before King Cormac's time, and he reigned about the year of Christ 250, and compiled into very much their present shape by St. Patrick about the middle of the fifth century, deal extensively with the subject of pigs; and in the most precise, elaborate and complicated manner and terms lay down the rules as to when the owner of a pig is liable for injuries done by it, what the fine should be if piggie had been frightened by shouting, what if the shouting was malicious, what if playful, what if by an adult in possession of his senses, what if by a youth callow and raw, what if the shout was necessary to drive it out of the corn, what if for that purpose but unnecessary, what the penalty if the pig was in his sty or at its dinner, when provoked.

For example, thus read some of the provisions: should a person shout, the pig is exempt as regards injury to the idler who is behind the person who shouted and between the person who shouted and the pig, in case the person who shouted is himself an idler since it is his shouting that incites her against all the other idlers; and there is half fine upon her owner for her injuring the profitable worker whilst the excitement caused by the shout is upon her, and when it is gone off her there is half fine from her owner for injuring the idler and full fine for injuring the profitable worker. She (pig) is exempt as regards injury to the idler who goes to her, to her trench, or her sty, or her trough, whether there be provocation or not; and as to the idler who provoked her and upon whom she charged out. There is half fine from her owner for injury to the idler who

did not provoke her, whether outside or inside. There is full fine to the profitable worker who did not provoke her.

If the pigs who have done any injury belong to a native freeman and it is their first offense, full half sick maintenance is due of them to the injured person, or half compensation, after death, is the fine. If they are vicious pigs belonging to a native freeman, there is half dire fine and sick maintenance until death to be paid, and half dire fine with compensation, after death; and the excitement of the shouting takes half of the fine off them. And though it should be desired that a part of the sick maintenance or of the compensation should be remitted in favor of the man who shouted, it shall not be so, for there is no compensation to be paid by the looker-on until compensation has been received from the actually guilty person. And when the man who shouted pays a part of the dire fine he does not pay any part of sick maintenance or of compensation, and when he pays a part of sick maintenance or compensation he pays no part of the dire fine. The proportion of the fine for shouting which is taken off the man who shouted does not fall on the pig, but is remitted; the proportion which shouting takes off the pig does not fall upon the man who shouted, but is remitted; and there is no participation considered between them, but the full fine is to be paid by each on his own account.

We may add that idle shouting is shouting for sport; malicious shouting is with the intent to injure; shouting for necessary profit is to drive the pigs out of fields of grass or corn, when they can not be driven out in a more lawful way; shouting for unnecessary profits is when they could be driven out in a more lawful way.

These venerable laws also deal at length with the liability of pigs when fighting

among themselves. But as no pig will read these pages we need not treat of that point.

During the Middle Ages pigs and sows were frequently brought before the criminal courts for offenses committed by them—they seem to have been particularly fond of attacking, mangling and killing children. In 1386 the judge at Falaise condemned a sow to be mutilated in the leg and head, and afterwards to be hung, for having torn the face and arm and then killing a child. This sow was executed in the public square clothed in a man's dress. The execution cost ten sous six deniers tournois, besides a new glove for the headsman.

On the tenth of January, 1457, a sow was convicted of the murder of an infant named Jehan Martin, of Savigny, and sentenced to be hanged; her six sucklings were also included in the indictment as accomplices, but in default of any positive proof that they had assisted in mangling the deceased, they were restored to their owner, on condition that he should give bail for their appearance should further evidence be forthcoming to prove their complicity in their mother's guilt. About a month later, on the Friday after the Feast of the Purification of the Virgin, the sucklings were again brought into court, and as their owner, Jehan Bailly, declined to be answerable for their future good conduct, they were declared forfeited to the noble damsel Katherine de Barnault, Lady of Savigny.

In the "Annuaire du Department de l'Aisne (1812)" are full details of the sentence pronounced upon a hog, June 14, 1494, by the mayor of St. Martin de Laon, for having *defacie* and strangled a child in its cradle. The sentence concludes thus: "We, in detestation and horror of this crime, and in order to make an example and satisfy justice, have declared, judged, sentenced, pronounced and appointed, that

the said hog, being detained a prisoner and confined in the said abbey, shall be, by the executioner, hung and strangled upon a gibbet, near and adjoining the gallows in the jurisdiction of the said monks, being near their copyhold of Avin. In witness of which we have sealed this present with our seal." The sealing was with red wax, and upon the back of the paper is written, "Sentence on a hog; executed by justice; brought into the copyhold of Clermont, and strangled upon a gibbet at Avin."

In 1497 a sow was condemned to be beaten to death for having eaten the chin of a child belonging to the village of Charonne, in France. The sentence declared that the flesh of the sow should be thrown to the dogs, and that the owner of the animal and his wife should make a pilgrimage to Notre Dame de Pontoise, where, being the day of Pentecost, they should cry, "Mercy," after which they were to bring back a certificate that this had been complied with. Lionnois, in his "Histoire de Nancy," gives a full report of the law proceedings on the delivery of a condemned pig to the executioner of Nancy, in 1572.

Among the musty records of the past we even find the charges of such executions, for instance, "For expenses within the jail, 6 sols; Item, to the executioner who came from Paris to Meulan to put the sentence in execution by the command of our lord the Bailiff and of the King's Attorney, 54 sols; Item, for carriage that conveyed her to execution, 6 sols; Item, for ropes to tie and haul her up, 2 sols 8 deniers; Item, for gloves, 12 deniers; amounting in the whole to 69 sols 8 deniers." This was a bill in 1403. (A sol was a sou; a denier the twelfth part of one.)

The conduct of the pig in the court room was usually disrespectful and militated against him; the records show that while

the learned counsel discussed the matter and the venerable judge laid down the law, the prisoner at the bar frequently grunted and screamed, and tried to poke his nose through the slats of the prisoner's box. An

pigs, fed at the public expense. These swine in Flanders were marked by a T cross, and were allowed to roam about the towns at liberty; in some places they became such a nuisance that the municipal authorities



TRIAL OF A PIG AT LAUSANNE IN THE FOURTEENTH CENTURY.

ox or a cow under similar circumstances usually won a certain amount of sympathy by quiet and submissive behavior and by the air of melancholy and regret assumed.

Saint Anthony was very fond of animals; in 341 he established a monastic order which had the right of keeping consecrated

compounded with the monks by paying the monasteries of St. Anthony considerable sums on condition that these pigs should be kept in. There was a house of St. Anthony in Threadneedle Street, London, and the swine belonging to it had the right on the saint's day to enter any house; they seem



to have had the liberty of wandering about the city on any and every day. If these T pigs committed any crime, such as did the cannibal swine aforesaid, the civil authorities could not condemn them to death without first having them tried before the ecclesiastical court. (*Vide XI GREEN BAG, 33.*)

A most celebrated reporter of ecclesiastical cases thus tells the story of a pig in the days when bluff old Hal was king; we quote verbatim:

"In the year of Our Lord 1538, Sir William Forman being Mayor of the City of London, three weeks before Easter, the wife of one Thomas Freborne, dwelling in Paternoster Row, being with child, longed after a morsel of a pig, and told her mind unto a maid dwelling in Abchurch-Lane, desiring her if it were possible to help her unto a piece. The maid perceiving her earnest desire shewed unto her husband what his wife had said unto her, telling him it might chance to cost her her life, and the child's too which she went with, if she had it not, upon this Thomas Freborne, her husband, spoke to a Butter-wife which he knew, that dwelled in Harnsey, named good-wife Fisher, to help him to a pig for his wife for she was with child, and longed for to eat of a pig: unto whom the said good-wife Fisher promised that she would bring him one the Friday following, and so she did, being ready dressed and scalded before. But when she had delivered him the pig, she craftily conveyed one of the pig's feet and carried it unto Dr. Cockes, at that time being Dean of Canterbury, dwelling in Ivey Lane, who at the time of his dinner before certain guests whom he had bidden, showed the pig's foot, declaring who had the body thereof. And after that they had talked their pleasure, and dinner being done, one of his guests, being landlord unto Freborne, called Mr. Garter, and by his office, King of Arms, sent

his man unto said Freborne demanding if there was no body sick in his house. Unto whom he answered, that they were all in good health, he gave God thanks. Then said he again, it was told his master that somebody was sick, or else they would not eat flesh in Lent. Unto whom Freborne gave answer, that his wife was with child and longed for a piece of a pig, and if he could get some for her he would. Then departed his landlord's man home again.

And shortly after his landlord sent for him. But before that he had sent for him he had sent for the Bishop of London's sumner, whose name was Holland, and when this Freborne was come, he demanded of him, if he had not a pig in his house which he denied not? That commanded Mr. Garter, the said sumner, called Holland, to take him and go home to his house, and to take the pig and carry both him and the pig unto Dr. Stokesley, his master, being then Bishop of London, and so he did. Then the Bishop being in his chamber with divers others of his clergy, called this Freborne before him, and had him in examination for this pig laying also unto his charge that he had eaten in his house that Lent powdered beef and calves heads. (This Freborne denied.)

In this time of this his examination which was during the space of two hours, divers came unto the Bishop, some to have their children confirmed and some for other causes. Unto whom as they came, having the pig before him covered, he would lift up the cloth and show it to them saying, "How think you of such a fellow as this? Is not this good meat, I pray you to be eaten in this blessed time of Lent, yea, and also powdered beef and calves heads too besides this."

And after this the Bishop called his sumner unto him and commanded him to go and

carry this Thomas Freborne and his pig opened thorow the streets unto the Old Bailey, unto Sir Roger Chomley: for the Bishop said he had nothing to do to punish him, for that belonged unto the civil magistrates: and so was Freborne carried with the pig before him to Sir Roger Chomleys house in the Old Bailey, and he being not at home at that time, Freborne was brought likewise back again unto the Bishop's place with the pig, and there lay in the Porters Lodge until it was nine of the clock at night. Then the Bishop sent him unto the Counter in the Poultry by the sumner and other of his servants. The next day being Saturday, he was brought before the Mayor of London and his brethren unto the Guild Hall: but before his coming they had the pig delivered unto them by the Bishops officer. Then the Mayor and the bench laid unto his charge (as they were informed from the Bishop) that he had eaten powdered beef and calves heads in his house the same Lent, but no man was able to come in that would justify it, neither could any thing be found save only the pig, which (as is before said) was for the preservation of his wife's life and that she went withal. Notwithstanding the Mayor said that Monday next following he should stand on the Pillory in Cheapside with the one half of the pig on one shoulder and the other half on the other. Then spake the wife of the said Freborne unto the Mayor and the bench, desiring that she might stand there and not he, for it was long of her and not of him. After this they took a Satten-list and tied it fast about the pig's neck and made Freborne to carry it hanging on his shoulder until he came unto the Counter of the Poultry from whence he came.

After this was done the wife of this prisoner took with her an honest woman, the wife of one Michael Lobley, which was well

acquainted with divers in Lord Cromwell's house, unto whom the said woman resorted for some help for this prisoner, desiring them to speak unto their Lord and Master for his deliverance out of trouble. . . . This they did . . . and the Lord Cromwell, upon their request, sent for the Lord Mayor of London: but what was said to him is unknown.

Now to show further what became of this pig whereof we have spoken so much, it was carried into Finsbury Field by the Bishop of London's sumner, at his master's commandment, and there buried. The Monday following . . . the Mayor of London with the residue of his brethren, being at Guild Hall, sent for the prisoner aforesaid, and demanded sureties of him for his forthcoming, whatsoever hereafter should or might be laid unto his charge: but for lack of such sureties as they required, upon his own bond, which was a recognisance of twenty pounds, he was delivered out of their hands. But shortly after he was delivered out of this his trouble, Mr. Garter, of whom we have spoken before, being his landlord, warned him out of his house, so that in four years after he could not get another, but was constrained to be within other good folks, to his great hindrance and undoing."

The pig that did most for the United States of America lived on the Pacific coast. His greed nearly caused war between the two great branches of the Anglo-Saxon race, and gave the Emperor William of Germany an opportunity of learning American geography, after he had in the early seventies finished his study of the map of France. This pig whose name, age and size are all unrecorded by the muse of history, lived in 1859, on the Island of San Juan, a beautiful islet lying sheltered from the waves of the Pacific, in the channel between the main shore of British Columbia

and the capital of Vancouver Island, Victoria, just outside Puget Sound. He was destined for the Hudson Bay Company by his master, one Griffith, who resided on the north part of the island. Mr. Hubbs lived on the other end of San Juan and raised vegetables and sheep. What nation owned the island none knew, for the boundary line ran through the middle of the channel, and, as might have been expected, there was a channel on either side of the island, — Rosario Strait on one side and Canal de Haro on the other.

The pigs of the Hudson Bay Company ate the vegetables of Mr. Hubbs, and he did not agree with this, and threatened Griffith that he would kill the next porcine marauder. The subject of this note soon came, ate and died at the hands of the angry Hubbs. Then was Griffith filled with wrath, and hied him quickly to Victoria, and came back with a constable bearing a warrant for the arrest of the pig-slayer. But Hubbs claimed to be an American citizen, laughed to scorn the summons of her late Majesty, Queen Victoria, and refused to go with the constable. The constable went home. Hubbs hurried to Port Townsend (Washington Territory), told his story to Brigadier General Harney, who forthwith sent Colonel Casey and a company of the Ninth Regiment of Infantry to encamp on San Juan and see that Mr. Hubbs was not molested by the British. Great was the excitement on the island of Vancouver while the American soldiers were settling their camp on San Juan. The British Admiral in great wrath moved his fleet to one of the bays of the little islet; but the Governor, Sir Thomas Douglas, pacified the irate son of Neptune, yet to show that the Lion claimed San Juan, he sent a captain of engineers and a company of soldiers to camp on the north end of the island. Then each

nation sent more soldiers and the war cloud seemed dark and threatening. However, General Scott appeared on the scene and persuaded the Governor to agree to a withdrawal of all troops, save one company on each side. This was done, and for five years the Stars and Stripes flew over the camp of the Americans on the Hubbs' end, and the Union Jack waved equally proudly over the Griffith pig farm. The best of feeling existed between the two camps, and courtesies were constantly interchanged.

Time went by, yet neither nation thought of abandoning her claim. At length it was thought well to call in the lawyers. Elaborate briefs were prepared and the whole matter was referred to the Emperor of Germany to decide which channel was meant in the original agreement. That illustrious sovereign had no time to consider the question himself, and so handed all the papers over to Herr Grimm, the once President of the Supreme Court of Germany, Judge Goldschmidt of the German Tribunal of Commerce, and Dr. Kiepert, an expert in geography. The American brief was the best, and in October, 1872, the Emperor gave his decision in favor of the American contention, thus giving San Juan and the command of both channels to that nation.

In the early days of the Massachusetts Bay Company the assistants chosen by the members of the company and the deputies or representatives chosen by the colonists sat together in the same chamber. A stray pig was a most powerful factor in changing this and he played his part in this wise. He wandered away from his own sty and was carried to one Captain Keayne of Boston — a rich man supposed to be of the Dives nature; the town crier gave due notice, but none claimed the stray, so the captain kept it with his own. In course of time he killed one of his own. After a year

a poor woman named Sherman came to see the stray and to decide if it was one that she had lost; not recognizing it as hers, she forthwith laid claim to the slaughtered pig. The elders of the church sat upon the case and decided that the woman was mistaken. Mrs. Sherman then accused the captain of theft, but a jury exonerated him and ordered her to pay three pounds costs. The irate captain then sued the woman for defamation of character and recovered a verdict of forty pounds damages. But ere this it appeared clearly that Mrs. Sherman had many friends and partisans; it had become a political question, a case of the masses against the classes. Thus backed the warlike lady appealed to the General Court. The length of the hearing shows the importance which was attached to the

case. After seven days of discussion a vote was taken. Seven assistants and eight deputies approved the former decisions, two assistants and fifteen deputies disapproved, while seven deputies did not vote. In other words, Captain Keayne had a decided majority among the more aristocratic assistants, while Mrs. Sherman seemed to prevail with the more democratic deputies. Regarding the result as the vote of a single body, the woman had a plurality of two; regarding it as the veto of a double body, her cause had prevailed in the lower house, but was lost by the veto of the upper. No decision was reached at the time, but after a year of discussion the legislature was permanently separated into two houses, each with a veto power upon the other. (Fiske, *The Beginnings of New England*, p. 106.)



## LYNCH LAW IN TEXAS IN THE SIXTIES.

By J. C. TERRELL.

"ALL nations have a patron saint, and every State its heroes." The early settlers of Northwest Texas were not without great men. I recall the names of Capt. Ephraim M. Daggett and Dr. Mansell Matthews. Both were large men, each weighing about two hundred and seventy-five pounds. Both were intellectually great and were born leaders of men.

Daggett was born in Canada, and came to the Republic of Texas in 1840. He was captain of a company of Texas volunteers in the Mexican war, and served with distinction. In 1861 he voted for the ordinance of secession, which was carried in Tarrant County by a majority of only twenty-nine out of eight hundred votes polled.

Dr. Mansell Matthews was a highly educated physician, of courtly presence, a Christian preacher without a superior in all the Southland. He had been County Judge of Red River County, and President of the Board of Land Commissioners. He and Daggett belonged to the Masonic Chapter here, and were bosom friends. Matthews was a Union man, too outspoken for his personal safety. He was a veritable patriarch of the olden times and annually travelled with his family, some forty in number, including slaves, camping out from Red River County to near Austin, some two hundred and fifty miles. There were no Indians and few fences to obstruct his march. He would return in the spring with the rising of grass, with flock and herd. He practised his profession, but seldom charged for services. His was a nomadic nature, and when on the move, his outfit was like a caravan of the great desert. People came from thirty miles to hear him expound the

Word, and receive his advice. He was not a politician; he loved the South, but made no secret of his Union sentiments. As sectional hatred intensified, the Doctor's real trouble began.

We then had a civil government in Texas, which existed only in name. The criminal law was as much in the hands of vigilance committees as was that of China in the hands of the Boxers; but I must say it was rarely abused. It would not do for the South to be torn by internecine dissensions. She could not afford to guard Valandighams with troops needed at the front. The high vigilance committee court was held in Gainesville, Cook County, and Dr. Matthews was, by its *capias*, imprisoned there for trial, charged with treason to the Confederate States of America. The "overt act" clause concerning treason, in the State constitution, had been changed by legislative action by law of Dec. 14, 1863, making convictions easier by new definitions of the crime. The penalty was death, and few accused escaped. Over a score of his fellow-prisoners, no more guilty than himself, were hung near his prison on an elm tree. Daggett got word from Matthews, and obeying his "mark," appeared before the terrible tribunal in his behalf, told them that Matthews had committed no overt act of treason; that his heart was with the South, his mind with the North; that if they hung Matthews they must hang him too.

Matthews was acquitted of the death penalty, but punished by imprisonment for three days, and he was, by way of further punishment, to receive no word of his acquittal during that time. Daggett was allowed to see the prisoner, but only in the presence

of the death guard, and was strictly enjoined not to tell the prisoner of the action of the court. Daggett, however, determined that Dr. Matthews should know that his life was saved, and told him so in this way. He talked for over two hours on the subject of death, the immortality of the soul, of repentance, faith, predestination, and especially on the absolute necessity of baptism by immersion as a condition precedent to salvation, etc. This was an unheard of thing for Daggett to do, and his distressed friend wondered what he meant. Of course, Matthews' nerves were strung and he was intensely on the *qui vive*, knowing that something ulterior was meant by Daggett. Now the guard, from the long, dry talk on the Bible, became listless and inattentive,

when Daggett asked Matthews what verse in the Bible afforded him the greatest comfort at this time, and in turn Matthews asked Daggett the same question, to which Daggett replied: "Fret not thy gizzard, and frizzle not thy whirligig, thou, soul, art saved." Matthews asked him to give chapter and verse of the quotation, which, of course, he could not do. After some other conversation the Doctor asked him to repeat the verse, the Doctor significantly bowing his head, knowing that his life was saved but that his friend was forbidden to tell him so. He slept soundly that night. Daggett remained in Gainesville three days, and restored Matthews to his family on Deer Creek. The above incident I had from the lips of both parties.

## A CURIOUS NULLITY SUIT OF THE THIRTEENTH CENTURY.

BY BEULAH BRYLAWSKI AMRAM.

THE principal parties in this case were Samuel Ibn Tibbon, plaintiff, and Biongude Cohen, defendant. It was tried before a special court at Marseilles, in November or December, 1255, and the records are preserved in a manuscript collection of Rabbinical decisions now in the Bodleian Library at Oxford. It was made the subject of a learned and somewhat prolix essay by Isidore Loeb published in the third volume of the "Archives Israelites" of Paris, to which I am indebted for the facts.

Moses Ibn Tibbon, the father of the plaintiff, was a celebrated scholar and a member of a distinguished family. His sister Bella was the mother of the defendant, Biongude (Good Jewess) and lived at Naples. Biongude's father died during her infancy and upon the death of her only brother in 1255 without children, she be-

came his heir, and his fortune together with that of her mother made her very rich. Her wealth excited the cupidity of Samuel Ibn Tibbon, her cousin, and led him to institute a singular suit, the result of which was exceedingly discreditable to him.

In 1255, when this suit was brought, Biongude was the wife of Isaac bar Simson whom she had married in the previous year, shortly before the death of her brother. Samuel and his father, Moses Ibn Tibbon, were present at the wedding, and Moses himself wrote the marriage contract. Shortly after the death of her brother and her acquisition of the inheritance in the year 1255, Samuel proclaimed himself her lawful husband and instituted a suit to annul the marriage with Isaac bar Simson; and, in order to make quite sure of her, he alleged that he had married her three times. The

case was first heard by a court of three judges at Marseilles, one of them chosen by the plaintiff, one by the defendant and the third by the two thus named. It was common among the Jews to try cases before such tribunals, and their decisions were binding, although sometimes, as in this case, the proceedings were removed to another court, composed of specially distinguished doctors of the law. The final judgment was rendered by a court at Montpellier.

The plaintiff, Samuel Ibn Tibbon, alleged that his first marriage with Biongude had taken place in 1246, a short time after the death of her father at Naples, when she was, according to his story, six years of age. He alleged that his father Moses was at that time in Naples and had written the marriage contract, that he and his father had then returned to Marseilles, whence they had sent some gifts to Biongude, which had been received by her guardians, and acknowledged as her marriage dowry. These presents consisted of jewels and fine stuffs of which clothing was made for her, which she wore for many years and remnants of which were still to be seen. These gifts had been sent in the presence of numerous friends and members of the family, and were accompanied by a deed of gift.

Samuel furthermore alleged that a second marriage had been contracted between them at Naples by means of a proxy, empowered by letter of attorney. A second marriage contract had been written, but had been lost. The records of the case throw no light on this second marriage and we are left in doubt as to its date and the reason alleged by Samuel for contracting it.

Biongude, who was about sixteen years of age at the time of the suit, alleged that her uncle, Moses Ibn Tibbon, had indeed been at Naples at her mother's house, but that his visit was made when she was three

years old and not six as Samuel alleged; that no marriage contract was entered into, but that the prospective marriage of the cousins had been discussed in the family circle and favored by the relatives. Her mother had often told her that when they went to Marseilles this marriage would be considered, but time passed and neither Moses nor Samuel seems to have given the matter any further consideration. She alleged that Samuel had so far abandoned the thought that he married another woman; Samuel admitted this marriage, but stated that he had entered into it under duress, being forced to do so by his father.

He strenuously denied that he had given up his rights and title as Biongude's husband, and said that about six years before he brought the suit he had set forth his claims in a letter to Biongude's brother-in-law. He also claimed that, about three years after this, Biongude and her mother had left Naples to reside permanently at Marseilles and had lived for some months in the house of his father. During this time he and Biongude were on a familiar footing, that would have been more than surprising if they had not been known to be husband and wife. To be entirely sure of his conjugal status he claimed to have married her the third time at Marseilles. He produced a witness named Mordecai bar Yekutiël, who testified that he had seen Samuel and Biongude together at her mother's house, conversing about their first betrothal and the marriage gifts that he had sent to her, and that he called her his wife. Then in the presence of this witness and of one Joseph bar Samuël he drew out a "flower of auripel,"<sup>1</sup> and, giving it to Biongude,

<sup>1</sup> "Auripel" in Provençal, "oripeau" in French, means a plaque or disc of gilded copper. The flower offered by Samuel was a kind of jewel in gilded copper. It was the custom in Provence and in Italy to offer a jewel of this sort to the bride instead of the more common wedding ring.

said in Hebrew, "Thou hast long been my betrothed wife, continue so by virtue of this that I now give thee," and added in Provençal, "By this thou art my wife." The witness Mordecai alleged that this took place about two months before Biongude's marriage with Isaac bar Simson. Samuel alleged that at this time another contract of marriage had been written, but he could not produce it, saying that it had either been lost or stolen from him. He said, however, that many people of Marseilles had seen it and that they were deterred from testifying by fear of the powerful and influential family of Biongude. He suggested that they might be induced to testify if summoned by the Court under penalty of excommunication.

Samuel's allegations concerning the third marriage were supported by two witnesses, one of whom was the said Mordecai bar Yekutiél, who rebutted the presumption arising from the youth of the girl by stating that this third marriage took place in 1253 when she was about thirteen years of age, hence of the age of consent.

The records show that Samuel cut a very poor figure in court and the judges did not conceal their disapproval of his cause. The marriage contracts on which he relied had all been lost or stolen; most of his witnesses were dead or were unwilling to testify; the names of other witnesses escaped his memory. He attempted to explain his contradictions by pleading lapse of memory, or that the judges applied to one marriage what referred to another. All this served to throw doubt upon the good faith of his charges, and all of the points that arose for decision during the trial were decided against him.

Biongude was represented by counsel, Rabbi Abraham bar Jonathan. At Jewish law, women had to be represented so that

their causes might be properly presented, whereas men were obliged to conduct their own causes. By her counsel she ridiculed the assertion that she had been betrothed to Samuel in Naples when his father was there, as at that time she was only three years old and still in the arms of her nurse. She denied any knowledge of the second and third marriages, calling the Court's attention to the fact that the second marriage was entirely unsupported by testimony and accusing the principal witness to the third marriage, Mordecai bar Yekutiél, of perjury. Witnesses were called to prove that this Mordecai had stated that he had never seen the marriage celebrated, and that he had been forced to sign the document which he was supposed to have attested. He was also proven guilty of usury and robbery.

Samuel tried to save his witness by accusing one of Biongude's witnesses of breach of faith and of slander, alleging that he had promised a certain physician not to do anything thereafter to injure him and had then accused him of poisoning his Christian patients. But this and other countercharges of Samuel were utterly refuted.

The important question of Biongude's age was finally resolved against Samuel's contention. He alleged that at the third marriage she was twelve years old and hence could legally consent to the marriage. He stated that he had a letter from his uncle, a distinguished Rabbi, which fixed her age by reference to the date of her father's death, but he regretted exceedingly that he could not produce it. Nor could he offer anything definite to the Court from the information he had gleaned in Naples and elsewhere. He charged her with a statement made by her in the Court of the Bishop of Marseilles in which she gave her age as twelve. She admitted the statement and claimed that it was a mistake and that



on account of the absence of civil public records for the Jews, questions of age were often difficult to determine.

It is remarkable that Moses Ibn Tibbon was not called to testify. It is presumed that the cause was removed from Marseilles to Montpellier at his suggestion because of the greater reputation of the judges at this place. The Court in summing up showed the weakness of Samuel's case. He had no proof of the alleged first two marriages, and although the third was said to have been contracted at Marseilles and confirmed in a public deed, the witnesses were ignorant of the contents of the document they had signed. Samuel could produce no marriage contracts, nor any witnesses who had ever seen any of them. Samuel and his father were present at the marriage of Biongude to Isaac and did not protest against it, although, according to his allegation, it closely followed his third marriage to Bion-

gude. And although Samuel was the scion of a distinguished family and Biongude was conspicuous as an heiress, there was no public knowledge of their marriage nor did any reputable witnesses come forward to prove it. The Court came to the conclusion that the charge was entirely false and that the motive that inspired Samuel was greed. He was at that time the husband of another woman, and he did not think of Biongude until, by her brother's death, she had become an heiress. If he had been successful in annulling her marriage with Isaac bar Simson, she would have been obliged to obtain a bill of divorce from him in order to be entirely free to be remarried lawfully to Isaac, and for this bill Samuel would have exacted a heavy price. This was the key to the situation and the Court touched the heart of the case when it decided, "Biongude needs no bill of divorce from Samuel."

## EARLY CRIMINAL TRIALS.

### IV.

THE case of Lord Grey, 9 St. Tr. 127 (1682) reveals a very serious domestic disturbance. Lord Grey was charged with a misdemeanor in debauching his sister-in-law, Lady Henrietta Berkeley, the eighteen-year-old daughter of the Earl of Berkeley. He was tried before Chief Justice Pemberton and a jury. Sergeant Jeffreys was one of the counsel for the prosecution. The evidence in support of the indictment, which was tendered mainly by the prisoner's mother-in-law, was to the effect that the young Lady Henrietta had been discovered sending messages to her brother-in-law, and this led to the production of some com-

promising letters from Lord Grey. Lady Berkeley testified that when she charged Lord Grey with misconduct he was very penitent, and agreed to submit to any banishment that she might desire; but he suggested that, lest suspicions should be aroused by any undue abruptness, he should be allowed to make one more visit at the house. It was then claimed that he had taken advantage of this opportunity to arrange to have the young lady taken away from her home. At all events she disappeared, and her parents had been unable to find her. The evidence to connect the defendant with her disappearance was entirely circumstar-

tial and not at all convincing, although Chief Justice Pemberton was hostile to the prisoner from the outset.

Soon after the case was opened Lady Henrietta appeared in court and sat at a table by the judge's feet. As soon as the Earl of Berkeley saw her he addressed the Court.

"My daughter is here in court. I desire she may be restored to me."

Sergeant Jeffreys.—"Pray, my Lord Berkeley, give us leave to go on; it will be time enough to move that anon."

Soon afterward, when Lady Henrietta's sister, Arabella, was testifying, there was another outbreak. Lord Grey stood by the clerks under the bar, and looked "very steadfastly" upon the witness, who became confused. "The sight of my Lord Grey," she said, "doth put me quite out of countenance and patience."

L. C. J.—"Pray, my Lord Grey, sit down. It is not a very extraordinary thing for a witness in such a case to be dashed out of countenance."

Earl B.—"He would not, if he were not a very impudent, barbarous man, look so confidently and impudently upon her."

Sergeant Jeffreys.—"My Lord, I would be very loath to deal otherwise than becomes me with a person of your quality, but indeed this is not so handsome, and we must desire you to sit down."

Several housemaids were put on the stand for the purpose of identifying Lady Henrietta as the person who had spent the night in a certain house. Jeffreys conducted their examination in his most persuasive style, usually addressing the witnesses as "sweet heart." One of these maids gave a curious explanation for her inference that the person in controversy, whoever she might be, was not a person of quality, because the body of her nightdress was finer

than the sleeves, whereas ladies of quality in those days invariably made the sleeves finer than the body.

At the conclusion of the evidence for the prosecution Lord Grey made a statement, denying *in toto*, the charges against him. He admitted a fondness for the young woman, but denied that he had induced her to leave her home. On the contrary she had written to him that she could no longer endure the treatment to which she was subjected at home (she said she was treated "like a dog"), and proposed to leave; whereupon he had at once informed Lady Berkeley that she had better look to her daughter. He denied that the young woman had been in his possession or under his control. He admitted knowledge of her whereabouts when the earl was seeking to find her, but did not deem it honorable to betray the confidence which she had voluntarily reposed in him. He produced evidence tending to prove these statements, and concluded by offering Lady Henrietta herself as a witness. The crown counsel strenuously objected; but as she was clearly not a party to the action the court allowed her to be sworn, with the preface, however, that "there is very little credit to be given to what she says." And at the conclusion of her testimony, in which she corroborated Lord Grey's statement that he had nothing to do with her going away, Chief Justice Pemberton brutally said to her, "You have injured your own reputation and prostituted both your body and your honor, and are not to be believed."

As the jury withdrew the earl renewed his efforts to secure his daughter.

Earl of Berkeley.—"My Lord Chief Justice, I desire I may have my daughter delivered to me again."

L. C. J.—"My Lord Berkeley must have his daughter again."

Lady Henrietta.—“I will not go to my father again.”

Justice Dolben.—“Are you under any constraint, madam?”

Lady H.—“No, my lord, I am not.”

L. C. J.—“Then we cannot deny my Lord Berkeley the custody of his own daughter.”

Then came the climax.

Lady H.—“My lord, I am married.”

L. C. J.—“To whom?”

Lady H.—“To Mr. Turner.”

L. C. J.—“What Turner? Where is he?”

Lady H.—“He is here in court.”

Mr. Turner being among the crowd, way was made for him to come in, and he stood by the lady and the judges. He was questioned by the judges and confirmed the marriage. Nevertheless the earl insisted that his daughter be delivered to him. Mr. Turner could take his remedy.

L. C. J.—“I see no reason but my lord may take his daughter.”

Earl of B.—“I desire the court will deliver her to me.”

Justice Dolben.—“My Lord Berkeley, we cannot dispose of any other man's wife, and they say they are married. We have nothing to do in it.”

L. C. J.—“My Lord Berkeley, your daughter is free for you to take her; as for Mr. Turner, if he thinks he has any right to the lady, let him take his course. Are you at liberty and under no restraint?”

Lady H.—“I will go with my husband.”

Earl of B.—“Hussy, you shall go with me home.”

Lady H.—“I will go with my husband.”

Earl of B.—“My lord, I desire I may have my daughter again.”

L. C. J.—“My lord, we do not hinder you; you may take her.”

Lady H.—“I will go with my husband.”

Earl of B.—“Then all you that are my friends seize her, I charge you.”

L. C. J.—“Nay, let us have no breaking of the peace in court.”

Then the court broke up. In the hallway a scuffle over the lady ensued, and swords were freely drawn on both sides; but the Lord Chief Justice, coming by, ordered the tipstaff (who had a warrant to search for Lady Henrietta and take her into custody) to take charge of the lady and carry her over to the King's Bench. Upon Mr. Turner asking if he too should be committed, the Chief Justice told him he might go with her if he would, which he did. They remained that night at the marshal's house, and on the last day of the term were released by order of court. The jury meanwhile found Lord Grey guilty; but the matter was compromised and no judgment was ever entered.

We may expect to find turbulent times in Ireland in 1689. The trial of Cavenagh and others for stealing cows is an illustration. (12 St. Tr. 630, 1689.) The testimony (it would be mockery to call it evidence) is a minor feature of the report. Lord Chief Justice Keating does most of the talking. At the outset, no person appearing to prosecute one of the prisoners, the Chief Justice says to the jury: “Gentlemen, you have nothing against this man; he was born in a state of innocency; but the truth is, the parties dare not appear against him.” When the witnesses for the prosecution appeared the Chief Justice admonished them: “As you will answer it before God, that you neither for favor nor affection be inclined to spare any of these villains; and likewise that you will conceal nothing of the truth as you will answer it at the great day, for I tell you the cries and groans of the poor women and children and the many families that are ruined and in great distress will go up to heaven against you.”

When Cavenagh was arrested a skean, or knife, was found on him.

L. C. J.—“Sir, how durst you carry such an unlawful weapon.”

Cav.—“My lord, I am a butcher; it was a butcher’s knife.”

L. C. J.—“Ay, I do not question but thou canst butcher upon occasion.”

Cav.—“I was ordered to have a skean, my lord.”

L. C. J.—“Pray, sir, who ordered you?”

Cav.—“The priest of the parish.”

L. C. J.—“A priest, sir.” (Turning to his brother judge.) “Do you hear that, brother?”

Baron Lynch.—“What priest, sir?”

L. C. J.—“Hold, brother. Come sir, I shall not ask you your priest’s name. I believe you will have occasion to see your priest soon, to do you a better office than to advise you to carry skeans.”

Nevertheless the jury did not include Cavenagh among those found guilty. “Gentlemen, you have acquitted the greater villain,” said the Chief Justice; “at your door let it lie.” The Ordinary being called to give those convicted the book for their clergy, the Chief Justice said to him: “Sir, I expect as true a return from you as if I were there myself. The times are so that men must forget bowels of mercy. Ordinary, do your duty. What place do you shew them?”

Ord.—“My lord, I shew them the fiftieth psalm.”

L. C. J.—“Let them read the fifth verse.”

According to Foster (*Crown Law*, c. 7, p. 306) the scrap of Latin called the “neck verse,” which was commonly made the test of reading, was “*Miserere mei Deus*,” probably the beginning of the fifty-first psalm.

The prisoners were unable to pass this critical examination, and were at once sentenced by the Chief Justice in a highly edifying speech. “On this side the Cape of Good Hope,” said he, “where are the most

brutish and barbarous people we read of, there is none like the people of this country. . . . It has come to pass that a man that loses the better part of his substance chooses rather to let that, and what he has besides, go than come to give evidence, and why? Because he is certain to have his house burnt and his throat cut if he appears against them. Good God! What a pass we are come to!” My lord sententiously prays to God that his levity has not given encouragement to such thievery, and expresses the opinion that as the world grows older it grows worse. When the sentence of death was pronounced some of the prisoners’ female relatives set up a cry, whereupon the Chief Justice closed the proceedings with the remark, “They did not cry thus when the cows were brought home to them; they were busied then in the killing and the powdering them up.”

The trial of Dawson and his companions, (13 St. Tr. 451, 1696) is the first of several cases of piracy reported in the State trials. The story of their crime reads like a page from *Treasure Island*. While the good ship “Charles the Second” was bound on a voyage to the West Indies, the crew, under the leadership of one Evard, and the ship’s carpenter, mutinied and took possession of the ship. Near the Groyne they put ashore the captain and all who were unwilling to embark upon a piratical voyage, and hoisted the black flag. Their subsequent adventures were thus described at the trial by one of the crew:

“In the morning they called up all hands, and the captain said every man should share alike, only he would have two shares. From thence they went to Bonyois and took in some salt; from thence to the Isle of Man, where they took three English ships and plundered them, and they took the Governor aboard their own ship until they had done. From the Isle of Man they went to the coast

of Guinea, where they put out English colors to make the natives come aboard to trade, and when they came aboard surprised them, took their gold from them and chained them in the hold, and when they came to the place called Island of Princes, sold seven of them as slaves. At Madagascar they watered ship and got provisions and cows to salt up. From thence they went to Joanna, and from Joanna they went to take a junk and sunk her. Then to Commerce, and there they met a small French vessel, which they took and sank. Then they went to Joanna again, and because the natives would not trade with them they burnt their towns. When by the mouth of the Red Sea all the Mocha fleet went by, and so they consulted whether they should follow them or stay there. And then they went after them and overtook them, and took one that was about three or four hundred ton, and took gold and silver out of her, and sent men aboard her to plunder and keep her. And next day they spied another sail, and got up their anchor and stood to her and took her; they killed several men aboard, and when they had taken and plundered the ship they left the men aboard to go to Turat again. And then they went to Rachipool, in the East Indies, and got water and necessities, and from thence to Dascaran, where they set about twenty-five Frenchmen and fourteen Danes and some English ashore; for they were afraid if they came back to England and were caught they would be hanged, and they thought themselves secure there. From that place they went to Ascension and then to the Island of Providence in the West Indies, and then they wrote a letter to the Governor to know if he would let them come in, and said they would present the Governor with twenty pieces-of-eight and two pieces of gold if he would let them come in; and the captain, because he had a double share,

offered forty pieces-of-eight and four of gold, and with that they sent some men down with the letter, and they came back again with a letter from the island that they should be welcome, and come and go again when they pleased."

Strange to say, on such evidence the prisoners were acquitted. But they were held and retried on another indictment, convicted and hung.

Where, as under the old criminal procedure, the accused was compelled to defend himself as best he could without the assistance of counsel, a defendant who happened to be also a trained lawyer enjoyed an uncommon advantage. This is well illustrated by the trial of Spencer Cowper for murder (13 St. Tr. 1105, 1699), the first case in the books of a thorough and scientific defence. Cowper was a man of position, the brother of Lord Chancellor Cowper, a barrister of repute and ultimately a judge. He was accused of the murder of Sarah Stout, a young Quakeress, who had long been on terms of social acquaintance with Cowper's family, and at whose house Cowper had at one time lodged while on circuit.

On the spring circuit of 1699 Spencer Cowper had expected to occupy quarters with his brother, as usual, but having called to pay his respects to the Stouts, he was pressed by Miss Stout after dinner to spend the night there. After supper he spent the evening with Miss Stout. At about eleven o'clock the latter called a servant and ordered a bed to be warmed for Cowper. While the servant was thus engaged she heard the front door shut, and on coming down to the sitting-room found that its occupants had disappeared: and although this servant sat up all night, neither Cowper nor Miss Stout returned. Cowper was seen to enter an inn about a quarter of a mile away shortly before eleven o'clock, and shortly afterward returned

to his lodgings. Miss Stout was neither seen nor heard of until the next morning, when her lifeless body was found in a mill-stream, entangled in some stakes near the shore. At the inquest, upon evidence that she had been of a melancholy temperament, it was decided that she had drowned herself while insane.

On the circumstantial evidence just narrated, the Quakers secured an indictment against Cowper and three others, whose maudlin remarks at a tavern on the night of the young woman's disappearance had excited suspicion. The Stouts and their Quaker friends attempted to support the prosecution by the testimony of experts. There was much conflicting evidence as to whether the body, when found, was floating on the water or was held up by some stakes; and upon examination no water was found in the stomach. The doctors for the prosecution maintained the theory that "it is contrary to nature that any persons that drown themselves should float upon the water; if persons come alive into the water then they sink; if dead, then they swim." They also asserted that water is found in the stomach of persons who die of drowning, and that its absence is wholly inconsistent with death so caused. Consequently, it was asserted that Miss Stout had been murdered, and as Cowper was the last person who had been seen with her, the jury were asked to infer that he was guilty of the murder.

Cowper defended himself and his fellow-prisoners with great ability. He contradicted the doctor's premise that the body had been found floating on the water, and he demolished their conclusions, on cross-examination, in a very conclusive way. He also offered some slight evidence of an alibi. Above all he produced letters from the dead woman to himself which indicated that she had fallen in love with him, and declared

that when he refused her advances, she rushed out, and, as he supposed, drowned herself.

Cowper's address to the jury may still be read with profit as an example of direct, orderly and forcible method. His opening (indeed the whole argument) is temperate and dignified:

"My lord, I speak for my own part; I know not at what price other men may value their lives, but I had much rather myself was murdered than my reputation, which I am conscious hath suffered greatly hitherto by the malice and artifice of some men, who have gone pretty far in making this fact, as barbarous as it is, to be credited of me, and therefore I must beg your lordship's and the jury's patience while I not only defend my life but justify myself also from these things that have unjustly aspersed me by the conspiracy and artifice of my accusers. . . . Now, for a man in the condition I was in, of some fortune in possession, related to a better, in a good employment, thriving in my profession, living within my income, never in debt, having no possibility of making any advantage by her death, void of all malice, and, as appears by her own evidence, in perfect amity and friendship with this gentlewoman, to be guilty of the murdering her, to begin at the top of all baseness and wickedness, certainly is incredible."

He evidently felt the delicacy of the position in which he was placed. With reference to his relations with Miss Stout, as a man of honor, he hesitated to produce the dead woman's letters; indeed, he stated that he would not have done so in his own behalf:

"I shall give the clearest evidence that ever was given in any court that she murdered herself. When I enter upon this proof I must of necessity trespass upon the character of the gentlewoman that is dead. I

confess this is a tender point; it is a thing I would willingly be excused from, and it is not without a great deal of reluctance and compulsion forced from me. . . . I will not enumerate particulars by way of opening, only I must tell your lordship that some letters of hers must of necessity be produced, which truly I should not meddle with if I had not these innocent gentlemen here to defend as well as myself. Perhaps it may be said that in honor I ought to conceal the weakness of this gentlewoman; but then in honor and justice to these gentlemen that are falsely accused with me I cannot do it. I hope that one reason will excuse me to the world, for I have no other that could have obliged me to bring these letters upon the stage. I solemnly protest, if I stood here singly in the case of my own life, upon the evidence given against me, — I take it to be so inconsiderable, — I would not do it; but I must do it to show that these gentlemen also are innocent and to preserve them, because I am satisfied in my mind that they are so."

In view of the circumstances this justification seems rather weak. Cowper's fellow-defendants were never in the slightest danger of conviction. The only semblance of evi-

dence against them was some unexplained allusion by them to the dead woman, made while they were intoxicated. Furthermore, Cowper had been under no obligation to undertake their defence. The fact that he was a married man would seem to have been a much better justification for a course which a man of honor would hesitate to pursue. His obligations to his wife and the good name of his children were certainly paramount, in such a situation, to his duty to protect Miss Stout's character.

In all justice Cowper should have been relieved from his embarrassing position by the Court. The case should not have been allowed to go to the jury. But throughout the trial the presiding judge, Baron Hatsell, was a mere figurehead; his languid indifference was contemptible. He was constantly grumbling about the time consumed by the defence, and he was so muddled over the medical testimony that he did not attempt to charge the jury upon it. He said in conclusion of his brief and puerile summing up, "I am sensible I have omitted many things; but I am a little faint and cannot repeat any more of the evidence." The jury returned a verdict of not guilty as to all the defendants.

### THE STORY OF THE GREAT SEAL.

ON the death of the reigning monarch the virtue of the Great Seal ceases, and a new seal becomes a constitutional necessity. Such has recently been the fate of the Great Seal of Queen Victoria which has now become the perquisite of the Lord High Chancellor. The seal which is made in two portions, the obverse bearing a different design from the reverse, remains intact. It is "damasked" by the new monarch, an

operation which consists in giving the seal a slight blow whereupon its efficacy is forever gone. A well-known instance of this procedure on the accession of William IV. gave rise to rival claims by two Chancellors, Lyndhurst and Brougham, the one being Chancellor when the old seal was damasked, the other being in office when the new seal was made. The King, emulating the wisdom of Solomon, ordered half the seal to be set in

silver and given to Brougham, the other half similarly set he bestowed upon Lyndhurst.

Great reverence has been shown from the earliest times for the "*clavis regni*" as Lord Coke terms the Great Seal. Round it has gathered a store of curious learning and antiquated practice. Concealed in its immemorial purse its history is wrapped in mystery, sometimes in romance, and it is always associated with the fate of the nation. Its precise origin is difficult to ascertain. Edward the Confessor had a Great Seal, the Norman kings were represented on the one side enthroned and on the reverse seated on horseback. John actually put the Great Seal up to auction and sold it to Walter de Gray during the term of his natural life for the sum of 5,000 marks, but after six years de Gray parted with it not entirely of free will. The custodian of the seal was not necessarily the Chancellor, his title properly was Lord Keeper, a distinction which occurs as late as the eighteenth century. There is one instance at least of a Lady Keeper, Queen Eleanor, wife of Henry III., who kept the Great Seal when her husband was in Gascony in 1253. At that period the seal was usually engraved REX ANGLIÆ ET FRANCIÆ on one side and REX FRANCIÆ ET ANGLIÆ on the reverse. To counterfeit the Great Seal was at all times a heinous crime. Bracton speaks of it as high treason, and Glanville writes to the same effect. By the statute of 25 Edward III. it was declared to be high treason, and with trifling exceptions it has remained so to this day. The object aimed at was not the benefit of the King but the protection and safeguarding of the privileges of the subjects. Once the Great Seal was affixed to any document nothing could avail against it. By a false seal the King might without his Chancellor's knowledge improperly barter away the legal rights of his subjects. The rule that the Great Seal

must never go outside the kingdom is of comparatively modern growth. In Plantagenet times it was frequently taken abroad and during its absence another seal was made and used in its stead. Of this practice there were instances in the reign of Edward I. Yet in later years we find it alleged as one of the articles of impeachment against Wolsey that he took the Great Seal out of the kingdom, namely to Calais, without the authority of the King or of Parliament.

The loss of the Great Seal was a serious affair of state, for without it the business of the kingdom could not be conducted. There is the well known instance of James II. throwing the Great Seal into the Thames on the eventful night of 10 December, 1688, when he fled from Westminster on his way to France. It was shortly afterwards recovered in the net of a fisherman near Lambeth, and the lucky finder was handsomely rewarded. After the battle of Worcester in 1651 the Great Seal of Charles II. was lost, probably it was thrown into the Severn; at any rate it was never seen again. This did not dislocate the national business, because some years before the Long Parliament had ordered a new Great Seal to be prepared to take the place of the one which had been carried away by Charles I. to Oxford. The custody of this new seal was entrusted to six Commissioners. There was much discussion and considerable opposition before this vital step was taken. No precedent was to be found for making a new Great Seal when the original seal was within the kingdom and still retaining its potentiality. In support of the resolution of the Commons the learned Prynne wrote an elaborate treatise of justification setting forth reasons why the action of Parliament was necessary and lawful.

It is a common error to imagine that the seal is never in the custody of the monarch. No doubt it was properly meant to be in the



custody of a subject for the better protection of the rights of the subjects, but when the King went abroad, he not infrequently took the seal with him. During the absence of the Great Seal a lesser seal was made and used, which itself was always placed in a purse with much solemnity and kept under several other seals only to be taken out and used for great matters of state. The Plantagenet kings were wont to hold the Great Seal in their own hands for days together, much to the dissatisfaction of the barons. Thus we read that Edward II. sent the Bishop of Winchester to the Lord Chancellor, then in London, commanding the latter to hand over the seal, whereupon it was carried by Adam de Osgodby to the King at Windsor where Edward was hunting and was kept there for five days. Nor was this the only occasion when Adam de Osgodby carried the Great Seal to and from the King and the Chancellor, for Edward would often send for it to seal some charter or gift on the intercession of one of his favorites. In these days the seal goes with the Chancellor wherever he goes, but this is a modern growth in practice. The customs of the holders of the seal varied greatly. When the Chancellor of Henry III. went to France he surrendered the Great Seal into the custody of the Keeper of the Wardrobe to be retained during his absence. It was carefully placed in a bag or purse to which were affixed three several seals. Whenever the seal was required each of the three great officers whose seals were thus used had to attend on the seals being broken and the Great Seal taken out; then they all carefully resealed the purse when the seal had been replaced in it. Again at another period we find that if the Lord Chancellor went on a journey to a distant part of the kingdom he usually entrusted the seal during his absence to two clerks of

the King. Very minute and elaborate are the recorded precautions to safeguard its existence and sanctity. In early days of course few could sign their own names. It was the common custom of every man to signify his consent to a document by his seal alone and to this rule the monarch was no exception. When he signed in his private capacity he had his signet for ordinary matters such as correspondence; other affairs which in some measure touched the public interest were put under the Privy Seal; but the business of the nation could only be transacted properly under the Great Seal. No signature was attached, the seal of itself sufficed. Occasionally the King would add his initials. At times of great urgency he might add a minute or note in his own handwriting, "we will that this matter be speeded without delay." One noteworthy exception appears to have arisen early and hardened into inveterate custom. When the monarch sent a message to Parliament he placed his signature at the head and at the foot thereof.

The transfer of the Great Seal from one Chancellor to his successor has been made in strange places and on eventful occasions. The tent of the monarch in the hunting field, where in the presence of two ecclesiastics it was handed to a Bishop, the keep of a border castle, the hall of an Oxford college, the royal bedchamber, in turn have been recorded by the chronicler. The fitting spot for the surrender of the seal to the incoming Chancellor was the marble table in Westminster Hall, and so the custom grew that "the occupant of the marble chair" was a synonym for the Lord Chancellor. Until Stuart times the Keeper of the Seal was generally an ecclesiastic, since then he has been the political head of the legal profession. — *The Saturday Review*.

**JURIES AND THEIR VERDICTS.**

BY JOHN DE MORGAN.

**W**HAT is the extent of the responsibility of a judge for the verdict of the jury? This question has been raised once more in England, and lawyers are divided. It is common ground that the judge should assist the jury in coming to a decision, and give them the benefit of his knowledge and experience, not merely as to the law, but also as to the facts and the proper inferences to be drawn from them. But supposing that he has done his best to guide the jury in the right direction, and in spite of his efforts they give a verdict which is, in his opinion, a wrong one, is he responsible?

In questions of fact, is it not more likely that the jury should be right than the judge? I once heard a celebrated English judge lecture a jury whose verdict, he maintained, was not in accord with the facts, when the foreman boldly interjected, "That is your opinion, my lord." The judge grew angry, and asserted that he was able to decide on the merits of the evidence, to which the foreman of the jury replied, "Very likely, my lord, but so are we; and we are twelve, while you are only one."

If a man is acquitted when the judge thinks he ought to have been convicted, is he responsible, or can he make the jury bear the burden? Certainly the judge is powerless, and can only give vent to his feelings, as did the worthy wearer of the ermine who, in discharging a prisoner, said, "The jury declare you innocent, but don't do it again."

Lord Bramwell, better known as Justice Hawkins, was once astonished by the jury returning a verdict of "not guilty" in a case where the judge thought the evidence conclusive. He asked the foreman to repeat the verdict, and then almost shouted: "Louder, sir, let the world hear your verdict." Turning to the prisoner, he told him that the

jury, in their superior wisdom, had disregarded the evidence, but that he disagreed with them, and was sure that the man was guilty; however, he had to discharge him.

At a trial held in Wales, in November, 1901, Mr. Justice Phillimore took occasion to berate a jury for liberating a prisoner. He even told the prisoner that he ought to have been convicted, nay more, that it would have been better for him if he had been convicted.

This was going very far, for a man is presumed to be innocent until he is convicted, and surely an acquittal by a jury is presumptive proof of innocence, and the judge was guilty of slander.

Some judges have upheld the right of the jury by declaring that twelve men listening to the evidence were better judges of fact than any one person, judge though he might be.

The late Sir George Jessel, Master of the Rolls, was very like the lamented Artemas Ward; he agreed that any one whose opinions were like his own, must be right. I was frequently in his court, and on one occasion, a distinguished barrister referred sneeringly to a verdict of a jury, whereupon the most learned Master of the Rolls stopped him, and reminded him that a jury was a judge of fact, and that twelve men listening to the same evidence, were not likely to be mistaken. Emboldened by this, I, unfortunately, some time later, mentioned a verdict given by a jury, and the same judge snapped his fingers and exclaimed: "A fig for juries! They are swayed by popular clamor."

At one time the jury was really a body of witnesses, and had no judicial function, save that they recorded what they had seen or heard.

For many years justice was dispensed in

England by means of the "ordeals." If a man was accused of any crime he had to undergo the following rather painful and unique process. First, he had to endure three whole days of fasting and prayer in church, where were assembled his accusers and twelve witnesses, or jurors. The Litany being read when the three days of fasting were over, the suspected man had to plunge his hand into boiling water, or in lieu of this, to take three steps with a bar of red-hot iron in his hand. Wrapping up the scorched or scalded cloth in hand, the priest sealed it up for three days. If, at the end of that time, the wound was healed, it was accepted as a proof of innocence; raw flesh proved guilt. In this trial, the jurors had to see that the ordeal was properly endured, and in case the accused should make any confession the jurors were witnesses to it.

The old oath was that each should "speak the truth," but in the reign of Henry VI. the formula was changed, and the jury was sworn to "decide according to the evidence." Thus, from having been witnesses, the individuals summoned grew into jurors, hearing others give the evidence, instead of being the givers of the evidence.

Though the jury is sworn to decide according to the evidence, the judges are not all agreed as to whether a jury can go behind that evidence and bring in a verdict based on their own knowledge or belief. Lord Chief Justice Hale expressed himself on this subject in the following terms:

"The trial is not here simply by witnesses, but by jury; nay, it may so fall out, that a jury, upon their own knowledge, may know a thing to be false, that a witness swore to be true, or may know a witness to be incompetent or incredible, though nothing be objected against him—and may give their verdict accordingly." (*History of the Common Law of England*, chap. 12, sect. 11.)

It was evidently the intention to make the

jury the sole judge of the guilt or innocence of an accused, and as one writer says that this is an advantage, because no convicted man can say who was actually responsible for his conviction, seeing that twelve men must individually and collectively have been agreed.

A jury must hear the evidence, and not act as a jury is said to have done in Australia a few years since. An accused pleaded "Not guilty," and at once the jury started to leave the court. They were asked why they left their seats, and the foreman replied that "the man said he was not guilty, so what was the use of trying him?"

Sometimes very curious points have been raised concerning juries. When Horne Tooke was arraigned on a charge of treason, the old formula read that he would be tried by "his God and his country," and Tooke raised an objection, claiming that he must be tried by God as well as his country, and that only his country was represented in court.

During the Fenian excitement, a little over thirty years ago, an Irish-American being accused of treason, demanded a jury *de medietate lingue*, claiming that it meant that half the jury should be composed of foreigners, and as he was an American, he wanted to avail himself of the right accorded foreigners. His request was denied.

In Scotland, the jury, in a criminal case, can bring in a verdict of "not proven," which covers a case where the moral evidence is stronger than the legal testimony. In civil cases a jury, after having been kept three hours in deliberation, can bring in a verdict, if nine agree, but if nine cannot agree after nine hours, the jury must be discharged.

The jury system is not perfect, but it seems to be the best adapted to our needs, and, certainly no better mode of judging of the right or wrong, innocence or guilt of an accused has been suggested.

# The Green Bag.

---

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

---

Communications in regard to the contents of the Magazine should be addressed to the Editor,  
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

---

*The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.*

## NOTES.

THE following hitherto unpublished anecdote of President Lincoln illustrates his well-known kindness of heart as well as his peculiar method of dealing with questions that came up for his consideration.

The son of an old German mail carrier, on one of the government routes in Pennsylvania, had been arrested for stealing a letter. He had given bail for his appearance at court, but as yet no indictment had been found against him, although there was no doubt of the boy's guilt. His father was a very worthy man and as there were extenuating circumstances, it was decided to make an appeal for executive clemency, and therefore the boy's counsel, accompanied by Judge Hale, member of Congress from the sixteenth Pennsylvania district, went to the President. After listening to the presentation of the case, Lincoln said, "I don't see very well how I can issue a pardon before the boy has been convicted, but"—after a little reflection—"I know what I can do. I can direct the District Attorney to enter a *nol. pros.*, and this I will do, provided the boy enlists in the army and serves for three years."

This was agreed to and the order was subsequently issued. The boy enlisted, served with credit throughout the war, and is now a respected citizen of the community in which he lives.

A MAN who had brutally assaulted his wife was brought before Justice Cole of New York, and had a good deal to say about "getting justice."

"Justice!" replied Cole: "you can't get it here: this court has no power to hang you!"

ONE day on the street in Fort Dodge,—his home town,—Senator Dolliver, of Iowa, encountered an old Irish friend, who had formerly worked for the Dolliver family and was a privileged character. The Irishman informed Senator Dolliver that after forty years of bachelorhood he was about to be married.

"Good, Pat," replied the Senator, shaking the Irishman's hand, "I'm glad to hear it; that's the proper thing: when a man marries, his troubles are at an end."

Pat married, Dolliver returned to Washington, and the Irishman's troubles augmented daily. His wife led him a strenuous life, and rolling-pins and flat-irons made life far from merry.

A few months later Dolliver returned to Fort Dodge and again met the Irishman, who told him how his wife had led him a merry chase.

"You told me, Misther Dolliver," said the Irishman, "that when a man marries his troubles were at an end; but, sure, mine had only begun, for my wife has treated me frightfully."

Senator Dolliver's eyes twinkled merrily as he replied:

"You're right, Pat, I said when a man marries his troubles are at an end; but I didn't say which end, did I?"

"I UNDERSTAND," remarked the village wag quietly to the Indiana oil-well owner, "in fact, I was so informed this morning, that there is a lien on that well No. 7 of yours."

"It's a lie," yelled the oil magnate, getting angry in a minute. "There ain't no man got a cent against that well!"

Then he went out-of-doors and found the night wind had careened the well at least six inches.

JUDGE N. M. HUBBARD, formerly general counsel for the Chicago and Northwestern Railway Company, looked after the Northwestern's court business for fully a third of a cen-

tury, and the case discussed here was tried in the Federal court in the days when Judge Dillon was on the bench in the southern district of Iowa. In those days the public hatred or anger against railway corporations was intense, and in his closing argument to the jury (defending the Northwestern in a large damage suit), Judge Hubbard told the following story:

"This popular clamor against railway corporations reminds me of a little experience I had the other day. Now, up in Cedar Rapids, where I've been living most of my life, I'm looked upon as an honest, upright man, and have lots of friends who vouch for me and say I'm all right, until I've got to have a pretty good opinion of myself. But I went down to Cedar county the other day to try a case, and when court adjourned, Judge Rothrock (who presided) and I went over to take a train, and while we were pacing the depot platform, I heard a couple of farmers discussing us. Said one:

"'Who's that fellow walking with Judge Rothrock?'"

"His companion looked over at me and said sort of contemptuously: 'Oh, that's Judge Hubbard of Cedar Rapids; he used to be a mighty fine fellow, but he's only a damned railway lawyer now.'"

Judge Hubbard won his case.

At the trial of Hastings, Fox, struck by the solemnity of Lord Thurlow's appearance, said in an aside, "I wonder whether any one was ever so wise as Thurlow looks."

IN a country neighborhood in West Tennessee lived an old gentleman whom I will call Markham, because that is not his name. He is a kind-hearted, benevolent old man, the very embodiment of honor, ever wishing to see right and justice prevail. On account of being what Pope termed the noblest work of God, his friends and neighbors concluded to run him for the office of magistrate in his district. He wasn't qualified for the position from an intellectual standpoint, but it must be borne in mind that he is not the first one to be elected to that responsible position who ran no danger of dying of enlargement of the brain.

When the election day rolled 'round and the

votes were counted out, that evening after the polls were closed, they told a tale of a handsome victory for Markham over his opponent. The old man made his bond, and felt of considerable more importance in the world as his neighbors began calling him "Squire."

About a month after he had been inducted into office, his first case came before him. Jim Hawley, a neighborhood darky, had been arrested by a constable for stealing chickens from another neighbor. The proof as to the prisoner's guilt was conclusive, for the fowls were found in his possession, and he could give no satisfactory reason as to how he came by them. Several witnesses were examined, and as there were no attorneys to make speeches the case was soon given to the old judge to decide. After all the evidence was in, the Squire took up his code, which he had studied diligently since his election, started at the beginning and went through to *finis*. Then raising his glasses and looking wise, he gazed straight at the prisoner and said:

"Wall, Jim, I kin fin' nothin' in the book thet suits yer case, but from the evidence, I'm sure thet yer stole Mr. Bollin's chickens, an' I'm boun' ter sen' yer up, an' I hereby sentence yer ter the penitentiary for three years; an' may the Lord have mercy on yer soul."

The smartest men in the crowd had to argue with the old man for half an hour before they could convince him that he did not have the power to send the thief to the penitentiary, and that the best he could do was to bind the prisoner over to the Circuit Court, which he, though still protesting, finally did in the sum of five hundred dollars.

A LAWYER who had recently come into town placed his shingle outside the door. It read, "A Swindler." A gentleman who was passing by saw the sign, and entering the lawyer's office said, "Man alive, look at that sign. Put in your name in full, Alexander, or whatever it is. Don't you see how it reads now?"

"Oh, yes, I know," replied the lawyer, "but I don't exactly like to do it."

"Why not," said the stranger, "it looks mighty bad as it is; what is your name?"

"Adam Swindler."

A NEW HAMPSHIRE judge has in his possession the following letter sent to him by an old farmer who had been notified that he had been drawn as a juror for a certain term of court:

Deer Judge: I got your letter tellin' me to come to manchesster an' do dooty on the joory an' i rite you these fue lines to let you know that you'll have to git some one else for it ain't so that I kin leave home now. I got to do some butcherin' an' sort over a lot of apples just about the time the joory will be settin' in your court. Si Jackman of this town says that he would soon as not go, fer he ain't nothin' else to do jest now, so you better send fer him. I hate the worst way not to oblige you, but it ain't so I kin at present. Ennyhow I ain't much on the law, never havin' been a jooryman 'ceptin' when old Bud Stiles got killed by the cars here some years ago when I was one that sat on the boddy with koroner. So you better send for Si Jackman, for he has got some kin in manchesster he wants to vissit anyhow, an' he'd be willin' to go fer his car fare there and back. Ancer back if you want Si. — *Lippincott's*.

WHEN Rufus Choate was practising in Peabody, Massachusetts, he received a letter from the Register of Deeds of Middlesex County, the contents of which was known to several wags of the place. In accordance with a request made in the letter, Mr. Choate, taking a carriage, drove to East Cambridge. Upon his return he was saluted by his friends, who asked him where he had been. Seeing that the facts were known he replied: "Oh, they've got a Register of Deeds up at East Cambridge who can't read writing."

"DREAMS are strange things," said a prominent Cedar Rapids attorney a few days ago, "and though I am not in the least inclined to give any credit to the dream book as an authority for forthcoming events, I was recently startled by the miraculous result of a lawsuit in accordance with a dream of my client."

"You may call it mental telepathy, spiritualism or any title you wish to affix to the incident, but the truth is this: I was trying a partition case for a farmer who lives south of this city a short time ago in which my client was the defendant. The suit had been hard fought before a jury at Marion and the arguments had been heated and in no manner brief. The jury

retired late in the afternoon with the instructions of the Court to bring in a sealed verdict.

"Early the following morning my client came to my office with his countenance wreathed in smiles. The night before he had left me with a worried, uncertain look upon his face and had apprehensions that he was to be a loser by a large amount. I was indeed surprised, almost startled to see the great alteration. The corners of his mouth were bent upward and his eyes sparkled. I saw my fees coming a hundred per cent. easier and couldn't hide the smile when I asked, 'Well, John, why so happy this morning?'

"I," he said, pushing the door of my consultation room shut, 'had a dream last night. Of course I do not believe in dreams, but it tickled me any way.'

"Well," I remarked. 'I am not given much to dreams myself, but out with it. Let us hear the midnight illusion.'

"I dreamed," said the client, 'that the jury returned a verdict in my favor.'

"Well, that was encouraging," I remarked.

"But better still," he continued, 'not only was the verdict in my favor but they granted me a judgment for \$10.'

"Impossible," I explained, 'the twelve men have no right to grant you a judgment for a penny. If they did it could be set aside, and it is not probable that twelve jurymen would do anything of that kind which has no precedent in the Linn County courts.'

"We were still talking when the telephone rang. I answered it and recognized the voice of the county clerk. I almost staggered from the phone when I heard the result of the verdict which had been opened and read in court. A verdict for the defendant for \$10. The farmer's dream had come true. The \$10 part of the verdict we had to waive as we could not legally be given such an amount, and the case was won, much to the delight of my client who went home with a firm belief in the prophetic power of a dream." — *Cedar Rapids Republican*.

A MAN, when tried for stealing a pair of boots, said that he had merely taken the boots in joke. It was found that he was captured with them forty yards from the place he had taken them from. The judge said that he had carried the joke too far.

ONE night, at Canton, E. H. Parker, the author of *John Chinaman*, heard in the middle of the night, a conversation on the roof of the house in which he was staying.

By listening, he discovered that the kitchen maid was in the attic talking to some one on the roof.

"Who is that you are talking to?" he asked.

"It is only Tim, the thief, sir. It's all right, sir; he won't come again to-night."

Mystified by this strange remark, he consulted a Chinaman, who told him that the woman had been conversing with a common thief, who had come on the roof to rob the house. The maid had heard the thief on the roof, and went up to tell him that he must not try to rob the house, as the people were awake.

"You see," said the Chinaman, "so long as you don't raise a cry when you detect a thief he will be reasonable with you. If you had given him in charge, it might have happened on some other night the thief's friends would have committed burglary with violence instead of mere thieving."

"Did youse git anything?" whispered the burglar on guard as his pal emerged from the window.

"Naw, de bloke wot lives here is a lawyer," replied the other in disgust.

"Dat's hard luck," replied the first; "did youse lose any'ing?" — *Exchange*.

THE LAW TIMES quotes from *Anecdotes of the Connaught Bar*, published many years ago, the following extraordinary story of Sir Theobald Butler, better known as "Toby Butler," a Roman Catholic leader on the Connaught Circuit of great eminence, who was appointed Solicitor-General for Ireland by James II.:—

He was engaged in an important case which required all his acumen and legal knowledge to defend, and the attorney, fully alive to the importance of keeping Sir Toby cool, absolutely insisted on his taking his corporal oath that he should not drink anything till the case was decided. He made, accordingly, an affidavit to that effect, and kept it as follows: The cause came on; the trial proceeded; the opposite counsel made a masterly, luminous, and apparently powerful impression on the jury. Sir Toby got up, and he was cool — too cool; his courage was not up to the striking point, his hands trembled,

his tongue faltered — everything denoted feebleness; whereupon he sent for a bottle of port and a roll, when, extracting a portion of the soft of the roll and filling up the hollow with liquor, he actually ate the bottle of wine, and, recovering his wonted power and ingenuity, he overthrew the adversary's argument and won the cause.

GIUSEPPE MUSOLINO, the famous Calabrian brigand, has recently been found guilty of murder after a trial of nearly two months' duration. The young criminal, though little more than twenty-six years of age, can boast a career of crime rarely equalled and never surpassed by Italian brigands. For over two years Musolino has succeeded in evading an army estimated at nearly five hundred strong, composed of police and carbineers, who, notwithstanding the substantial reward of £800 offered by the Italian Government for his detection, were continually nonplussed by the adroitness of their quarry, assisted by the Calabrian peasants and mountaineers. His eventual capture was purely accidental, and was due to his having stumbled over a wire fence when he was taken prisoner by two carbineers, both of whom were totally ignorant of his identity. Musolino was the leading representative in Calabria of the "vendetta," a system so engrained in the minds of the poorer classes as to be regarded as the only legitimate form of social justice. Notwithstanding his numerous crimes, Musolino was to the last honored and respected by the Calabrian peasants, who were always ready to warn him by prearranged signs of the approach of the police. He was arrested five years ago on a charge of attempted murder and sentenced to twenty years' penal servitude; but, after a short detention, managed to escape by the help of some fellow convicts. Before he had been at large many months no fewer than seven of those who had given evidence against him had been either shot or stabbed. — *Westminster Gazette*.

MRS. PETTIFOGGER (scandalized) — "Charles, I heard the other day that old Judge Barleykohn said that he hadn't tasted water for twenty years. Do you suppose it is true?"

MR. P. — "Shouldn't wonder, my dear. You see, the old gentleman has an iron constitution, and he's probably afraid he'll rust it."

THE Guildhall Museum, says the *Law Times*, has just been enriched by a very grim collection, presented by the authorities of Newgate Prison. It is a miniature chamber of horrors, including a whipping-block, a set of leg irons, an iron waist-belt, old chairs from the prison chapel, a leaden cast of the City arms, dated 1781, used within the precincts of the gaol; the magistrates' book, 1814; the minutes' book, with the mournful record of the visiting justices, 1843-1878; and a bust of Sir John Sylvester, who, on account of the severity of his sentences, was known in his day as "Black Jack." There were several other gifts, such as casts of the heads of notorious murderers, but the library authorities, being cheerful and generous, thought they had got enough reminders of the worst side of human character, and sent these gruesome physiognomies on to Scotland Yard, where they proved very acceptable.

THE writer knows a well-meaning young justice who has a considerable marrying business and who, when he took the office, wrote out a nice little speech to be delivered to the bride and groom just before collecting the usual two dollars. This speech he can say backwards and forwards and he can begin in the middle and say it both ways. The other day he joined a couple in the holy bonds of matrimony and threw in the customary enthusiastic and inexperienced advice of a bachelor, free of charge. His peroration ran something like this:

"I hope you realize the full seriousness of the important step you have taken. It shall be your duty, sir, to guard and protect and cherish; and yours, madam, to love and respect and obey. This is the greatest event that can happen in the life of either of you — an event that stands out as the preëminent event of your lives. Henceforth those lives will run together until one of you shall lay down the burden of life to cross the dark waters, and there wait for the coming of the other. You are now one through life, with one heart, one purpose, and one destiny. I hope and trust you realize all these things. I hope you understand the step you have taken."

"I'd ought to," replied the blushing bride. "I've been married three times and divorced twice."

# LITERARY NOTES.

IN his recently published *Reminiscences of a Dramatic Critic*<sup>1</sup> Mr. Henry Austin Clapp — equally well known to the Boston bar as the Clerk of the Justices of the Supreme Judicial Court, and as the dramatic critic, for many years, of the *Advertiser* — has recorded, in his usual graceful manner, much that is of interest concerning the stage and the leading actors of the last half century. Mr. Clapp's criticism of the great Shakespearean actors — Fechter, Booth, Salvini, Irving; Charlotte Cushman and Adelaide Neilson — is of exceptional value, because it is the work not only of an experienced dramatic critic, but also of a profound Shakespearean scholar.

To the Bostonian the volume is of especial interest, for Mr. Clapp traces the dramatic history of the town from the spectacle, farce, melodrama and minstrelsy of fifty years ago, down through the Robertsonian period and through what our author calls, happily, the "Great Dramatic Quinquennium," *quinquennium mirabile*, — the half decade between 1870 and 1875; the happenings of later years he touches on more or less incidentally, especially in his excellent chapter on William Warren.

Most of Mr. Clapp's volume is of more than local interest, however. What he has to say of the influence of the "business end" on newspaper dramatic criticism is decidedly frank and refreshing, though not more frank than his conclusion — unquestionably true — that of our theatre audiences only a small proportion — say a quarter — have any intelligent appreciation of, or interest in, good dramatic art. Particularly good is his chapter on "The Ephemeral Drama and the Enduring Drama," in which he declares that only the plays that pass into literature — that, like the old Greek tragedies and comedies and like the Shakespearean plays, can "endure reading and rereading," — can be enduring. In these pages Mr. Clapp advocates, as he has advocated elsewhere for many years, the establishment of an endowed theatre, which he believes would make for the betterment of dramatic art; although he sees that improvement must, of necessity, be slow.

<sup>1</sup> REMINISCENCES OF A DRAMATIC CRITIC. By Henry Austin Clapp. 1902. Boston: Houghton, Mifflin and Company. Cloth: \$1.75 net. (pp. viii + 241.)



## NEW LAW BOOKS.

THE AMERICAN STATE REPORTS. Vol. 84. Containing cases of general value and authority, decided in courts of last resort of the several States. Selected, reported and annotated by *A. C. Freeman*. San Francisco: Bancroft-Whitney Company. 1902. (pp. 1035.)

As usual in volumes of this series, the important notes in this current volume cover a wide range of subjects. For example, while *McGrew v. Mutual Life Insurance Company*, 132 Cal. 85, calls forth a note on "Exceptions to Rule that the Domicile of a Husband is the Domicile of his Wife," *Chapin v. Cooke*, 73 Conn. 72, one on "Conditions in Restraint of Marriage," *Rose v. Rose*, 104 Ky. 48, one on the "Constitutionality of Statutes affecting Rights based on pre-existing Marriage," and *Bank v. Smith*, 38 Or. 72, one on "Powers of Attorney by Married Women," — subjects more or less related to each other, — yet these notes are followed by others, for example, which treat at considerable length such diverse subjects as "Failure to comply with the Statute requiring the Stamping of Writings," following *Garland v. Gaines*, 73 Conn. 662, "Binding Effect of Conditions on Unsigned Passenger Tickets," *Walker v. Price*, 62 Kan. 327, "Self-destruction as Defense to Life Insurance," *Supreme Conclave, etc., v. Miles*, 92 Md. 613, "When and against whom Fixtures may, by Agreement, retain the character of Personal Property," *Fuller-Warren Co. v. Harter*, 110 Wis. 80, "Have Municipal Corporations any greater Right than Individuals to Pollute Waters?" *Winchell v. Waukesha*, 110 Wis. 101, and "The Right of Policemen to arrest and of Citizens to resist," *State v. Evans*, 151 Mo. 95. The original volumes of reports from which cases in this volume are taken are — besides the reports cited above — 113 Georgia, 26 Indiana Appeals, 112 Iowa, 104 Kentucky, 125 Michigan, 78 Mississippi, and 22 Rhode Island.

THE HIGHWAY LAW OF THE STATE OF NEW YORK. Containing all laws relating to highways, as amended to the close of the legislative session of 1902, with annotations, forms and cross-references. By *H. Noyes Greene*. Second edition, by *L. L. Boyce*. Albany, N. Y.: Matthew Bender. 1902. Law sheep: \$4. (pp. xxviii + 471.)

While of course this, like all law books, is primarily for the lawyer, we imagine that the layman — especially the town and county official — will make much use of this volume; for there are many matters relating to highways which touch the average citizen closely, and which come within the duties of the officials above mentioned. To the New York lawyer it is a matter of decided convenience to have collected, as here, all of the statutes relating to the subject of highways, especially as the notes trace the history of the respective sections and give the judicial decisions bearing thereon.

PROBATE REPORTS ANNOTATED: containing recent cases of general value decided in the courts of the several States on points of Probate Law, with notes and references. By *George A. Clement*. Vol. VI. New York: Baker, Voorhis and Company. 1902. Law sheep: \$5.50 net. (pp. xlv + 832.)

The one hundred or so cases reported in this sixth volume include what may be fairly called the more important probate cases decided in the several States from June, 1900, to July, 1901. This and the preceding five volumes of the series contain a valuable store of probate law, the practical value of which is enhanced by the editorial notes and references. The users of this volume appreciate the convenience of having printed in each volume the list of Editorial Notes of each of the preceding volumes, as well as of the current volume.







*H. Gray*

# The Green Bag.

---

VOL. XIV. No. 9.

BOSTON.

SEPTEMBER, 1902

---

HORACE GRAY.

AN ENCOMIUM.

BY FRANCIS R. JONES.

THE end of the long and distinguished judicial career of Mr. Justice Gray has come. It is too soon to estimate in its entirety the greatness of it, or the irreparable loss to the law of his withdrawal from his high office. For nearly forty years he has sat upon the bench, enriching the law with his wonderful learning, a great judge, a scientific jurist, a perfect magistrate, a noble man,—noble by the gifts of nature, noble by his own great acquirements. It is impossible, too, at this time to definitely assign him to the place among the great judges in our language, that impartial history, with an adequate appreciation of his achievements, will award him. Especially is it difficult, if not impossible, for the present writer to speak of Mr. Justice Gray and of his work in measured terms. Yet, I am confident that no praise is too great, and that to one who studies his judicial work with unbiased mind, there will be created unhesitating and unqualified admiration.

The greatness of his office and of his services, now unhappily ended, removes the offence of speaking of the living.

In his opinions he always goes to the very heart of a legal question. He is conspicuously ingenious and powerful and unanswerable in dealing with an entirely new legal proposition, or in settling a much vexed question. Added to these great reasoning

powers is a memory singularly and wonderfully active and retentive. His terse and accurate expression of thought is peculiarly felicitous and is a perfect vehicle in which to convey his judgments. It has made possible the proud boast that in all his long judicial career he has never written a word that later he has been obliged to take back or modify. This fact alone shows his great care and industry, his perfect self-criticism, his great knowledge of the law, his balance and great foresight.

There has never been a judge whose opinions are less equivocal or more full of law and legal propositions, or drawn with a firmer hand and stated with greater clearness. When you have read an opinion of Mr. Justice Gray, you have read a complete and authoritative treatise upon the points of law involved, stated in perfect and perspicuous English. He never deals in glittering generalities. He never indulges in *dicta*. He never goes farther than it is necessary to go in the disposition of the case before him. He begins with a conceded and settled proposition, and leads you on irresistibly to a conclusion that is the only possible logical or legal one, with a grasp so firm that it compels conviction. It satisfies your reason as the opinions of hardly any other judge do. Indeed, I can think of but few who are in the same class with him. Lord Hardwicke, Lord

Stowell, Lord Mansfield, Lord Blackburn, Sir George Jessel, Lord Cairns and John Marshall have approached him, but not one has surpassed him. His great knowledge and perfect memory of cases help him to adorn his opinions with conclusive citations. He never tries to restate a proposition in his own language, that has been satisfactorily stated by a former authority. His great care and fairness in referring to the points of law favorable to the losing party in the cause are preëminent, and add to the weight of his conclusions. In a word, his decisions are models of what judicial opinions ought to be—luminous, instructive, cogent, replete with learning. They are survivals of an elder time, when the law was a science and precedents counted, when it was recognized that some points were settled beyond controversy, and if a case had to be over-ruled, it was done with a full statement of citations and reasons therefor.

The appearance of Mr. Justice Gray upon the bench has always been inspiring. His splendid stature, his grand head, his firm mouth, his keen, intelligent brown eyes, his great dignity, his strict attention to the business before him, make him appear, as he is, the ideal judge. He has always been impatient with waste of time, with foolish argument, with anything that detracted from the high dignity of the law. Because of his firm upholding of the dignity of the Court, he has been accused at times of insisting upon matters of no importance. But in truth he has never arrogated anything to himself as a man, although he has always demanded much for the Court and the Law. No man has ever been more human than he, or had a keener sense of humor, or a kinder heart. His ready aid has always been given without sparing to young attorneys. His secretaries, who worked with him, as well as for him, have every one conceived the greatest love and ad-

miration for both the great man and the great magistrate, a love and admiration that have only increased with the receding years of their service, because they are based upon such solid as well as intimate relations. He has always kept young of heart and is singularly single-minded. His work has been nothing to him for himself, but it has been everything to him for the law. The law has been his passion. To it he has devoted his life and his talents. He has believed and demonstrated that it spelled justice. In writing an opinion he has never neglected the thorough investigation of any point of law, however far afield that investigation might lead him, or however arduous it might be. And he has always given to each opinion as much thought, and work, and time, and enthusiasm, as if it were the first one he had ever written, or as if his reputation would depend upon that alone. His accuracy is unerring. No pressure could hurry him in his work. He has believed that it is wiser and more conducive to the correct administration of justice for the parties in a cause to wait for its decision, until that decision can be properly and satisfactorily announced, than to hurriedly throw together an opinion. He has always conscientiously attended to the duties of his circuit while he has been a member of the Supreme Court of the United States. He has sat upon the bench of the Circuit Court and the Circuit Court of Appeals, and written opinions in cases heard in those tribunals, with persistence and regularity and with the same patient care and ardor that he devoted to his work upon the Supreme Court. Consider for a moment what this has meant. From October to June he has been engrossed by his steady and taxing work in Washington. At the time of year when most men need and seek recreation, voluntarily he has taken upon himself additional duties. For all his life he has worked all

the day and all the evening, without haste, but with a calm perseverance that was untiring, and by reason of which he has reached the ultimate foundations of law governing each question that he has considered, and achieved those learned and luminous opinions, which are depositories as well as expositions of the law.

His life has been the studious, secluded life of a scholar, immersed in and satisfied by his great subject. Yet his long and great career has brought him a profound knowledge of men and of affairs. Although his life has been spent in rendering decisions, no man ever had less pride of opinion. When pleased with his work as embodied in a decision of the Court, he has been glad, not because it redounded to his own credit, but to the credit of the law. In truth, he has been the priest of scientific jurisprudence. He has felt that praise and merit were due not to him but to the science whose oracle he was.

The breadth of his interest and learning in law is commensurate with the law itself. His opinions show that he is as much interested in a case involving the dry and technical reasons for a marshal's or clerk's fees, as in one of constitutional law. They also show that his knowledge of the law of property and trusts is only equalled by his learning in admiralty law and equity pleading. And I venture to believe that he has shown himself the most perfect living master of the vexed problems involved in conflict of laws. Besides these, he has written opinions that are landmarks in the law, on courts-martial, *ultra vires*, and the law merchant. His decisions prove him deeply read in the Year Books and conversant with many cases in some of the most rare and authoritative ecclesiastical reports. His large experience upon the Bench has increased and broadened the learning of his earlier years, when he

and the late Judge Lowell used to read the English Reports together. He has always kept conversant with current decisions, systematically reading the English and more authoritative American reports. With all his constant and unremitting work, with all his eager and severe self-criticism, the enthusiasm for acquisition of knowledge has never forsaken him. The vigor of his intellect is amazing. He is, as a judge should be,

"liberal-minded, great,  
Consistent, wearing all that weight  
Of learning lightly like a flower."

The passing of so great a jurist from the place upon the august tribunal which he has so long adorned, cannot be other than a calamity. It is impossible now to estimate all the unfortunate consequences. Mr Justice Gray's resignation is as great a misfortune for the law, for the administration of justice and for the nation as was the death of Mr. Chief Justice Marshall. Indeed, I conceive that the two great magistrates are much alike. I believe that Mr. Justice Gray has as great and comprehensive a mind as Marshall had; that he has the same high conception of the judicial faculty and function. To these he adds a far deeper and wider knowledge of the law. What Mr. Chief Justice Marshall was able to do by sheer force of intellect, Mr. Justice Gray has been able, not only to do, but to embellish with profound learning.

This is no time or place to enter upon any biography. It is simply an attempt to express an appreciation of the great work that he has done. All that will be attempted here is a bare statement of dates, and a meager list of a few of his most important opinions. The following epitome has been written by one who is peculiarly conversant with the facts:

Horace Gray was born at Boston, Massachusetts, March 24, 1828; graduated at Harvard University in 1845; admitted to

the Boston bar in 1851; Reporter of Decisions of the Supreme Judicial Court of Massachusetts from 1854 to 1861; appointed in 1864 an Associate Justice, and in 1873 Chief Justice of that court, and in 1881 an Associate Justice of the Supreme Court of the United States.

Some of the more interesting opinions drawn up by him while in the Massachusetts court are in *Briggs v. Light Boats*, 11 Allen, 157, on the exemption of the United States from suit; *Jackson v. Phillips*, 14 Allen, 539, on the law of charities; *Boston v. Richardson*, 13 Allen, 146, and 105 Mass. 351, on ancient grants, and on boundaries; *Kershaw v. Kelsey*, 100 Mass. 561, on the effect of war upon private rights; *Haskell v. New Bedford*, 108 Mass. 208, on sewers; *Stone v. Charlestown*, 114 Mass. 214, on annexation of towns; *Russ v. Alpaugh*, 118 Mass. 369, on collateral warranty; *Hill v. Boston*, 122 Mass. 344, on liability of municipal corporations to private action; *Foster v. Foster*, 129 Mass. 559, on constitutionality of confirmatory statutes; *Davis v. Old Colony Railroad*, 131 Mass. 258, on contracts *ultra vires*; *Commonwealth v. Lane*, 113 Mass. 458, *Milliken v. Pratt*, 125 Mass. 374, *Ross v. Ross*, 129 Mass. 243, and *Sewell v. Wilmer*, 132 Mass. 131, on conflict of laws; and the Opinion of the Justices on Money Bills, 126 Mass. 557.

Among the more important judgments of the Supreme Court of the United States, delivered by him, are those on legal tender, in *Julliard v. Greenman*, 110 U. S. 425; on the novelty requisite to support a patent, in *Pennsylvania Railroad v. Locomotive Engine Truck Co.*, 110 U. S. 490; on the status of Indians, in *Elk v. Wilkins*, 112 U. S. 94; on guardian and ward, and on conflict of laws, in *Lamar v. Micou*, 112 U. S. 452, and 114 U. S. 218; on the constitutionality of mill acts, in *Head v. Amoskeag Manufac-*

*turing Co.*, 113 U. S. 9; on wills and administration, and on parties in equity, in *MacArthur v. Scott*, 113 U. S. 340; on infamous crimes, in *Ex parte Wilson*, 114 U. S. 417, and *Mackin v. United States*, 117 U. S. 348; on contracts of shipment, in *Norrington v. Wright*, 115 U. S. 188, and *Filley v. Pope*, 115 U. S. 213; on the powers of courts-martial, in *Smith v. Whitney*, 116 U. S. 167; on the exemption of property of the United States from taxation by a State, in *Van Brocklin v. Tennessee*, 117 U. S. 151; on common carriers, in *Phoenix Ins. Co. v. Erie Transportation Co.*, 117 U. S. 312, and in *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397; on the civil law in Louisiana, in *Viterbo v. Friedlander*, 120 U. S. 707; on debts of towns in New England, in *Bloomfield v. Charter Oak Bank*, 121 U. S. 121; on the restriction of equity jurisdiction to questions of property, in *In re Sawyer*, 124 U. S. 200; on writs of error to State Courts, in *New Orleans Waterworks v. Louisiana Sugar Refining Co.*, 125 U. S. 18; on the original jurisdiction of the Supreme Court over suits by a State, in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265; on capital and income, in *Gibbons v. Mahon*, 136 U. S. 549; and on jurisdiction over Guano Islands, in *Jones v. United States*, 137 U. S. 202.

He has delivered very few dissenting opinions, the best known of which are in *The Arlington case*, *United States v. Lee*, 106 U. S. 196, and in *The Original Package Case*, *Leisy v. Hardin*, 135 U. S. 100.

This list could be extended almost indefinitely, but it is enough to indicate the importance of his career. To attempt to quote selections from these opinions, or to discuss exactly what their importance is, would expand this article to an unseemly length. Most of them are so well known to the pro-

fession that comment would be superfluous. They are a sufficient monument to the fame of the very greatest. A careful study of them, an intelligent grasp of the legal principles involved and set forth in them, would make any one a well-equipped lawyer. It would be a great and grateful task to classify all his opinions and to treat them adequately. But such a work would require a lifetime of close application. It would result in a complete treatise upon almost every branch of the law, and would leave the writer with a legal knowledge second only to that of his great master. I believe that this is no hyperbole, that it is no exaggeration. Yet I am sadly persuaded that his great work will never receive the just recognition due to it from the profession. His reputation would have been paramount had his career been fifty years earlier. The past twenty-five years have been a time of transition and iconoclasm. Precedents have counted for little, and therefore scientific jurisprudence has counted for less. Elsewhere I have ventured to record a protest against this tendency of the law,—*vox clamantis in deserto*,—and shall not reiterate it here. But the uprooting of legal foundations

necessarily will deprive one of our greatest jurists of the fair fame he has justly earned. In many directions his life work will leave little impress upon the law. His great learning, embodied in his opinions, by means of which he solved so many great legal questions, will help few of his successors in the solution of new problems, because jurisprudence has ceased to be a science. But by the lovers and students of the old science, I venture to believe that the name of Mr. Justice Gray will be placed beside those of Coke and Mansfield, Hardwicke and Stowell, Blackburn and Jessel, Cairns and Marshall. He has been a great case lawyer, but he has also been much more. He has shown himself to be a bold, ingenious, and deep reasoner. He has adapted old principles to new facts, and when occasion has arisen he has created principles, based on such sound foundations and buttressed by such perfect analogies and sound logic that they have been accepted at once by the profession, and hardly recognized as new. This is the work of a great scientific jurist.

"When comes another such? Never, I think, Till the sun drop dead from the signs."

## SHERLOCK HOLMES' PLOTS AND STRATEGY.

BY J. B. MACKENZIE.

TAKING up a little while ago for diversion the collection of Conan Doyle's entertaining detective stories, which, with his *Sign of the Four*, made him famous,—the writer could not fail to perceive how much his characters' methods, meant to be those of a clear-sighted, well-disciplined worker, justify criticism; how often, from unstable premises, he builds faulty conclusions. New interest, by the way, is just now

aroused in the novelist's hero—as much the distinguishing product of his brain as Gulliver is of Swift's, or Robinson Crusoe of Defoe's—on account of his resurgence, after his extinction was decreed, in *The Hound of the Baskervilles*.

It is right to premise that while this conception of his theory and practice will be duly impressed as the discussion proceeds, not the least aim of this essay is to inquire



to what extent the various circumstances brought to light in his experiences constitute legal evidence of crime. Entering on the treatment of Holmes' deductive process exhibiting the fruit, as he himself makes known, of an observance of trifles, the curious may be interested to learn that Zadig, an Oriental figuring in the dawn of history, was the first to obtain for it secure footing as a system. Many will no doubt remember the tale of the lost dromedary, about which its owners, two prosperous merchants, sought information from the expert, unknown to them to be such at the time of making their inquiries. Able to convince them that if the missing quadruped had one blind eye, was deprived of a tooth, and bore on each flank different commodities—honey and rice—he had recently visited the neighborhood, they, to his intense surprise, cite him before a magistrate as admitting knowledge that would seem to implicate him in its larceny. He is discharged in triumph from the accusation on explaining that, although he had never seen the animal, its presence not long before was attested by the facts that grass along its track had been cropped from one margin only, and that every tuft removed showed a gap in the middle, besides the symptom that flies had gathered about the leakage from its burden at one side of the road, while ants lingered in the vicinity of that on the other.

The self-centered authority whom these comments involve—who betrays, at one time, the depth and caution of an adept, at another, the haste and maladroitness of the tyro—is frequently observed to stray without valid excuse from the path in which his professional brothers, controlled by wisely ordained laws, feel themselves constrained to walk, habitually ignores landmarks which the regular experimenter is well satisfied to recognize. Now, of all work to which ability

and resource may be pledged, that of the unearther of crime ought, by its performance, to gain respect, one would think, for the maxim, "Too many cooks spoil the broth." Our subject nevertheless too often prefers to lean on the contradictory assurance, "In a multitude of counsellors there is safety," a doctrine which placed over against the other evokes the moral that man should not pin his faith to proverbs. Among the peculiar shifts to which he resorts is the roping in of a group of idlers for the purpose of bringing about a make-believe street quarrel, in order that upon its reaching its height he may be violently thrown to the ground and suffer to all appearances grave injury—that simulated issue leading to his being humanely carried into the house where his crucial move is afterwards to be made. Would these confederates, it may be inquired, have risked their not unlikely arrest by the police for causing a breach of the peace, without insisting beforehand that they should, to some extent at least, be taken into the manager's confidence. And, if drawn to the scene, what measure of credence would the guardians of public order attach to a representation that the whole affair was a sham?

Following his prey on this occasion, the hunter, as we gather from his own intimation of the result, was unable to keep himself concealed behind the stalking-horse called to his aid. At the by no means trifling risk of some of them revealing the secret, he several times allows three or four in this way to become privy to his intentions, and share in their putting into effect.

Having once mapped out the course to be followed—chosen the cards he will play—Holmes never sticks at the means by which his end shall be accomplished. When he is not pointing a loaded revolver at some wrongdoer's head to reduce him to submission, he, without fear of an action of

assault and false imprisonment before his eyes, turns the key of his door on another, the more readily to extort a confession, serenely flying in the face of the wholesome requirement that neither threat of evil nor promise of favor must be exerted to achieve this consequence. Nor does he scruple when carrying out his design, so impatient is he of control, to lay himself open to the charge of being an accessory after the fact or of being concerned in misprision of felony. Mark this astonishingly candid report of the manner in which he obtains possession of a stolen article, and deals with the felon: "It was a delicate part I had to play there; and I knew that so astute a villain would see that our hands were tied in the matter. I went and saw him. At first, of course, he denied everything. But when I gave him every particular that had occurred he tried to bluster, and took down a life-preserver from the wall. I knew my man, however, and I clapped a pistol to his head before he could strike. Then he became a little more reasonable. I told him that we would give him a price for the stones he held—one thousand pounds apiece. That brought out the first signs of grief he had shown. 'Why, dash it all,' said he, 'I've let them go at six hundred pounds for the three!' I soon managed to get the address of the receiver who had them. On promising him that there would be no prosecution, off I set to him, and after much chaffering, I got our stones at one thousand pounds apiece."

The shady relations our adventurous zealot confesses to have established with the receiver are worthy of being noted. The conscience, moreover, of this untrammelled operator is not always too nice to deter him from encouraging his clients to accept hush-money, or, indeed, to save him now and then from pocketing a tidy reward himself to offset expenses for receiving the criminal

dowry. One of the least defensible of Holmes's practices, as it appears to the writer, is the making responsible officials of Scotland Yard parties to compromises, approval of which, if incident to real life, would unquestionably cost them their positions. Imagine, for example, a superintendent of police being complaisant enough to overlook a systematic robbery for years of the public by a fraudulent beggar, and undertaking without demur not to prosecute.

Some illustrations of Holmes's theorizing may be adduced to make good the assertion that quite as liberal a proportion of sophistry as logic is there embodied. He argues, in one case, from the circumstance of a stranger's hat, which he submits to close inspection, not having been, as he professes to detect, brushed for weeks, that the partner of his bosom has ceased to love him. Is it the customary lot of the male to find his hat relieved, where needful, of accumulations of this kind by a ministering Eve, supposing him blest with one? Still descanting upon the hat, he maintains that candles, and not gas, furnish the medium of illumination in its possessor's dwelling, because a number of tallow stains adhere to the brim; adding the suggestion that "he walks upstairs at night probably with his hat in one hand, and a tallow candle in the other." But why take his hat upstairs at all, or—if he were in the habit of performing this out-of-the-way detail—why put it elsewhere than upon his head? Then, how would grease from the candle, held in one hand, fall on the hat, carried in the other? Again, surmising the identity of a criminal from certain traces he leaves behind, his left-handedness is deduced from observing "that the blow" (inflicted on the murdered man) "was struck immediately from behind," and exceptional height from the compass of his stride in walking. To pass unchallenged

the reasoning as to left-handedness, is not the length of a man's pace largely a matter of idiosyncrasy—something which is not, at any rate materially, dependent upon stature? Do not very many tall men take comparatively short steps, and a good number, of less inches, cover more ground with each? Have we not, besides, experience to testify that the upper and lower halves of the human body are often largely disproportioned? On a further occasion, trying to elucidate his course of proceeding at the expense of his associate, Dr. Watson, he thus deliberates: "My dear fellow, I know you well. I know the military neatness which characterizes you. You shave every morning, and in this season you shave by the sunlight; but since your shaving is less and less complete as we get further back on the left side, until it becomes positively slovenly as we get round the angle of the jaw, it is surely very clear that that side is less well illuminated than the other. I could not imagine a man of your habits looking at himself in an equal light, and being satisfied with such a result." Was not the calculator, to be able to draw this inference, required to impart a factor into the equation, which may not have represented the fact, namely, that it was his friend's custom to face the north when pursuing this routine, so that the light would strike on the right cheek?

A noteworthy instance of what strikes the writer as distinctly vulnerable argument is contained in the story entitled, *The Adventure of the Engineer's Thumb*. An hydraulic engineer, who had come from London to examine a machine, the purpose of which his employer told him was to extract "fuller's earth," is from certain appearances it presents forced to the belief that it is being put to a questionable use; and on hinting this is forthwith, by way of revenge, placed underneath it; the machine—which

is, in reality, employed for towing—being at the same time, set in motion. A coal-oil lamp is in the room, standing well under the press. After watching, for a few seconds, the terrible engine of death proceeding on its downward course, intent upon crushing him, as he meditates, "to a shapeless pulp," he notices a small panel being pushed backwards at one side of the room, the walls of which, it is important to know, are built of wood, though ceiling and floor are of iron.

Immediate contact of the machine with the floor must be the outcome of its progress, in the absence of any metal to be impressed. The engineer miraculously escapes through this opening: and having returned to London, takes Holmes back with him, in the hope of locating the coiner's retreat, to which he had been previously conducted blindfolded. They find the house on fire, and this is the detective's remark to his companion: "Well, at last you have had your revenge upon them. There can be no question that it was your oil-lamp which, when it was crushed in the press, set fire to the wooden walls, though no doubt they were too excited in the chase after you to observe it at the time." Could igniting by any chance follow under the circumstances? And, even if such were possible, would not the flame have been too momentary to allow of its extension to the walls? Where, too, would a draught sufficient to keep it alive come from?

Looking at them in the mass, as it behooves a critic to do, the writer is led to the conviction that were the incidents on which they are exercised made to run the gauntlet of the rules of evidence, nearly all of Holmes's dialectic efforts would fall short of actual demonstration of the point to be settled in each case. His present attempt to review some of the episodes met with in the career of that renowned exponent of the

detective's art may be fittingly closed with the statement that any impression of the marvelous and profound in his estimates becomes perceptibly weakened by their

valuer bearing in mind that it is nowise difficult, where there is a preconceived solution of a tangle, to suit every development to its needs.

## THE CONSTITUTION AND RELIGION.

BY SOLOMON MENDELS.

IN two short provisions of the Constitution of the United States is embraced the utmost security ever afforded a free people in matters of religion. The one declares that "No religious test shall ever be required as a qualification to any office or public trust under the United States." Art. 6, Sec. 3. This clause is perspicuous and requires neither comment nor exposition. The other provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." Amend. 1. This provision is also very clear in terms and no hidden ambiguity can ever be translated into its meaning. Ambiguity is the scourge of good laws. Perverted meanings, strained constructions, and hard cases are its legitimate offspring. Not so in this case. Another phase of difficulty is here presented. Not what does this clause mean, but how far does it practically extend? The application begets and presents to the naked eye a maze of intricacy which such an innocent sentence could scarcely be suspected of concealing. Let us consider for a moment its history.

In the earliest colonization of America, *i. e.*, in Virginia, we find among the first exercises of the law-making power an Act recognizing the Church of England as "the only true church." And its doctrines and principles were not only recognized, but strictly enforced. There would have been

no place in Virginia for the non-conformist, and a reign of religious persecution was soon in full sway, with its attendant evils, its clergy living in opulence on the tithes of the parishioner, its enforcement of parochial duties, and the consequent death of free thought and expression. Even in the North, the Plymouth colony, which had braved a new world in search of religious liberty, gave to the church most valuable privileges and favorable protection, and punished idolatry with death. The following extracts from the Connecticut Code of 1650 will give a good idea of the laws prevailing at the time in nearly every colony.

### CAPITALL LAWES.

1. If any man after legall conviction shall have or worship any other God but the Lord God, hee shall bee put to death. Page 28.

2. If any man or woman bee a witch, this is, hath or consulteth with a familiiar spiritt, they shall bee put to death.

3. If any person shall blaspheme the name of God the ffather, Sonne or holy Ghost, with direct, express, presumptuous, or high-handed blasphemy, or shall curse in the like manner, hee shall bee put to death.

If any Christian, so called, within this jurisdiction, shall contemptuously beare himselfe towards the word preached or the messengers that are called to dispense the

same in any congregation, when hee doth faithfully execute his service, and office therein, according to the will and word of God, either by interrupting him in his preaching, or by charging him falsely with an error, which hee hath not taught, in the open face of the church, or like a son of Korah, cast uppon his true doctrine, or himselfe, any reproach to the dishonor of the Lord Jesus, whoe hath sent him, and to the disparagement of that his holy ordinance, etc., shall for the first scandall bee convented and reprov'd openly, by the magistrates at some lecture, and bound to their good behaviour: and if a second time they breake forth into the like contemptuous carriages, they shall either pay five pounds to the publique treasure, or stand two houres openly, uppon a block or stoole foure foott high, uppon a lecture day, with a paper fixed on his breast written with capital letters "AN OPEN AND OBSTINATE CONTEMNER OF GOD'S HOLY ORDINANCES," that others may feare and bee ashamed of breaking out into the like wickedness.

There are also other provisions compelling attendance upon divine services on the Lord's day, public fast days, etc., under a penalty of five shillings.

These instances cannot but point out a most lamentable state of affairs in the very land which was but a little while after to demand a religious freedom guaranteed by fundamental law and thus raised above the encroachment of power. Rhode Island alone contained the norm of religious toleration. In no modern state is there a securer guaranty than that embodied in the fundamental law of this colony. Everyone was given the right to "freely and fully have and enjoy his and their own judgment and consciences in matters of religious concernment." A powerful safeguard, this, and of inestimable value. Maryland discriminated

most unjustly between the different Christian sects, as for example, by excluding Roman Catholics from office.

This was indeed an age of bigotry, and with very little change continued down to the time of the Revolution. So late as 1776, when the constitution of Pennsylvania was in process of formation, it was proposed to restrict membership in the Assembly and the right to vote and hold office to those who on oath or affirmation professed "faith in God the Father and in Jesus Christ, His eternal Son, the true God, etc." Thorpe, an able writer on our basic law, excuses these and similar limitations on the right of suffrage on the ground that the age set the qualification, and that property and religious tests were the most convenient. However true this may be, it is manifest beyond the peradventure of a doubt that at the time of the war religious freedom was an exceedingly rare article.

This leads to the question, What part did religion play in the Revolution? Many learned writers claim that one of the direct causes of the struggle for independence was the fear that an Episcopal hierarchy might be imposed upon the people. It is very true that years before James II. had issued a commission for the government of Massachusetts, New Hampshire, Maine, and New Plymouth which should encourage the Established Church. By the Declaration of Indulgence in these colonies religious freedom was secured, formally if not actually, for New England was the nest of bigots, who would brook no such unwelcome innovation. But behind this seeming benevolence was a Catholic king with secret designs for the extension of his own faith. Why say then that in matters religious the colonists were deeply sensitive? But it is quite natural that oppressors are always ready to cry out when it is feared that a similar yoke might

enslave them. A thief was complaining that someone had robbed him! These facts, coupled with the great difference of opinion which existed among the various colonies, cannot but convince us that religion played little or no part among the causes of the Revolution which followed.

Religious toleration being unknown at the time the Constitution was adopted, how came it that the two provisions which guarantee it were brought into existence a few years after? This is a question deeply involved. The section relating to religious tests was not deeply inquired into in the debates. It is true that one member of the convention expressed a fear that a Pope might become President, which fear was speedily dissipated by having his attention called to the qualifications for eligibility to this office. The impossibility of agreeing upon any particular test is undoubtedly the reason of this clause. No test in itself was objected to. From this logically flows the fact that we owe the omission of religious tests to the merest accident. Affairs in the colonies were quite involved in matters of religion. Yet this clause of our Constitution is a most potent blessing and its benefits are apparent at once.

The causes which led to the adoption of the first amendment of the Constitution, so far as it relates to religion, are not at all clear. Why should all the colonies, so lately deep in the mire of oppression, suddenly lay aside their weapons? Mr. Thorpe claims that religious equality was only secured by "equal economic opportunities in America." Mr. Justice Story in his commentary on the Constitution maintains that the real purpose of the first amendment was not to countenance any sect that might find root in the new republic, but to prostrate and stifle rivalry and contention, and to make it an impossibility for any one Christian sect to

acquire the reins of government in its hands and use the power which is concomitant with political supremacy as a weapon of assault against its less fortunate rivals. Christian sects alone were considered. No reference was made to the existence of other faiths or the opinions of others. This corresponds with the usual narrow views of the colonists in these matters. So it is manifest that this amendment was not dictated by a generous spirit of toleration, but by a profound fear and jealousy that if any particular Christian sect gained a national ascendancy it would subrogate matters temporal to an ecclesiastical hierarchy. But to secure their point the States put it out of the power of Congress to interfere with other religions, and when we consider that non-Christians were at this time frowned upon, we cannot but reach the conclusion that this concession was unwittingly made. It is true that in after years the States became more liberal and in their own constitutions guarded zealously the religious freedom of their people.

As has been intimated, the difficulty in dealing with the first amendment is in its application to practical cases and events. Accordingly, the many cases in which this clause has come before our highest tribunal for interpretation and construction have founded a system of rules which are now powerful precedents. An adequate conception of the difficulty which a court of last resort must face in matters like this is almost impossible, unless we first consider what a *faux pas* would mean. We live in a free country where every man may worship as he pleases. But suppose, under a *bona fide* belief that he is doing right, a man offers as a sacrifice a human being. Would such a plea prevail in answer to a charge of murder? If not, then is the government interfering with the religious belief of one of its citizens? The answer to these questions is readily found.

What is or is not a crime depends on the current religious belief of a nation. Crime in one State may not be crime in another. But it is claimed that the Christian religion, being paramount in point of the number of its devotees, is the standard in the United States. Upon this premise the law has spoken. "Crime is not the less odious," says Mr. Justice Field, "because sanctioned by what any particular sect may designate as religion." But the most valid reason that can be advanced in support of this proposition is the source of our American jurisprudence. The common law, its most copious fount, had ever recognized the Christian religion in its administration. And public policy, which is, after all, the criterion of crimes, depends on the state of morals which the dominant religious belief dictates.

But in this connection a curious anomaly is presented. Secular employments are forbidden on Sunday throughout the entire country. The common law, salutary and just for the most part, did not interdict Sabbath-breaking. The constitutionality of Sunday laws has been upheld generally, but the reasons of the judges for their decisions are not only contradictory but at utter variance with all true doctrines of constitutional

law. The subject is not free from difficulty. A government is bound to recognize certain acts as criminal even though they are clothed in a religious garment. It was earnestly contended by counsel in the case of *Davis v. Beason*, 133 U. S. 345, that any tenets however destructive of society could be followed by those advocating and practising them. "But nothing is further from the truth," says Mr. Justice Field. It is also observed that while a law may not interfere with "belief," it may oppose a pernicious "practice." How subtle! Religion says what is or is not a crime. We punish crime, but we do not interfere with religion. In this the courts are unanimous. But are not the two inconsistent?

In conclusion, it may be noted that in matters of religion unanimity is difficult of attainment, for different sects give birth to different views. But the much-vaunted *dictum* that liberality alone is at the foundation of the two provisions of the Constitution under consideration must be exploded. The one was born of disagreement, the other of fear,—neither of a very noble mother. To the credit of the country it may be said that they are never violated, and the resultant era of toleration has played no small part in the prosperity which we have enjoyed.



## A NOTABLE CASE.

WE wish to call the attention of our readers to the epoch-making case of *Fitzimmons v. Jeffries* recently decided at the Hilary Term of the Inferior Court of San Francisco before Greany, C. J. The following record of the trial, which has not, as yet, been reported in any legal periodical, may prove of interest.

## DECLARATION.

And the plaintiff says that some years ago he was possessed of a belt of great value, and that the defendant *vi et armis*, rudely, hostilely and without gentleness did take away the belt aforesaid from the plaintiff and despoil him of it, so that it was wholly gone and not in the keeping of the plaintiff at all, at all.

And he further says that since the time of the aforesaid impolite act various unsuccessful claimants to the chattel have appeared, notably one Tom who brought a bill against Jim.

Wherefore the plaintiff prays judgment.

## PLEA.

And the defendant denies each and every allegation of the foregoing declaration, and furthermore contends that it is insufficient in law.

At the trial much evidence was adduced by both sides. The following extracts comprise the most important parts :

Miss Solar Plexus, being duly sworn, testified : "I am a servant in the household of a Mr. Corbett. I am familiar with belts of all kinds, manual, leather and championship. I was present at the altercation between the parties to this suit on July twenty-fifth. I saw nothing that would lead me to suppose the plaintiff was entitled to this belt."

On cross-examination : "I am related to Mrs. Hittem Inde Slatz, but this fact does not prejudice me in favor of the plaintiff."

Mr. Left Hook, being duly sworn, testified : "I hope the Court will pardon my voice, as I have had a very troublesome night. Yes, insomnia. I know both parties intimately, having lived with them since childhood's happy hours. I saw the plaintiff on the night in question. He did not look cheerful. He was lying on his back listening to a man who could count as high as ten."

On cross-examination : "Yes, I have had insomnia before ; at Carson City and Coney Island. The plaintiff may have been comfortable. He was lying on his back. Someone said he was asleep, but his face bore none of the marks of the cherubic sleep of infancy." (Objection sustained.)

Count Stumik Punchiski : "I am much interested in this case. I was present at the end. I am a friend of the defendant and work for him."

On cross-examination : "I admit the plaintiff does not like me. I have been called fast, but I can prove I am hard working."

His Honor then told the jury that if from the evidence they believed that the plaintiff on the night of July twenty-fifth publicly lay upon the floor for the space of one-sixth of a minute, their verdict should be for the defendant.

The jury, accordingly, without leaving their seats, brought in a verdict for the defendant.

It is believed that the case will not be appealed.



## QUEER LAWS OF MEDIÆVAL GLASGOW.

BY WILLIAM E. JOHNSON.

THAT period of Scottish history from the time of the "Blessed Reformation" up to the Restoration of King Charlie the Second, was a season of freak jurisprudence, scarce equalled in the history of "Be it Enacted." It was a century of statutory austerities of the gravest sort, which broke up in a wild medley of bacchanalian orgies following the downfall of the Cromwell regime and which, under the leadership of the jovial Charles, has likely never been surpassed since the celebrated feast of Belchazzar, Mayor of Babylon.

And it is a queer streak in Scottish character that King Charlie, with all his leanings toward a "high old time" and with all his reputed looseness of morals, is canonized in an equal degree with John Knox and his theology, Queen Mary with her weaknesses and virtues, and with Bobby Burns amid his reckless flirtations with Highland Mary.

During this period, the enacting of laws in Glasgow was both vested in and usurped by the Town Council and the Church (Hie Kirk) Session. Frequently the Presbytery took a hand, but seldom ventured beyond legislation regarding behavior at church. Both the Town Council and the Session, however, transacted a voluminous business in making laws.

Whenever the former body made a law which did not come up to the standard of required public morals, the Session would make the necessary amendments. As long as the Town Council enacted statutes to the satisfaction of the church authorities, they were not interfered with. The Session confined itself mainly to legislating regarding spiritual affairs, but was ready at all times to take a hand in secular matters on the slightest provocation.

During this period, the centre of Glasgow's ecclesiastical as well as secular and social life was the old Hie Kirk on the hill, which venerable pile is still preserved as the Cathedral of to-day, the seat of the established church functions of the present time. It is surrounded with the graves of these mediæval lawmakers, and an object of acute interest to all, especially those who flavor their speech with the Gaelic accent.

### LAWS ON BEHAVIOR AT CHURCH.<sup>1</sup>

It was deemed extremely important that there should be a general attendance at the "examinations" preceding the communion season. Accordingly, in 1546, the Session enacted that those absent from these examinations should not be admitted to the communion but should be "raised" if they sat down. The people who offended by remaining at home should be punished by "hail and fire" for the first offense and pay a fine of ten pounds besides. The dose for the second offense was same with a double fine.

Forty years later, some of the rheumatics of the city got into the habit of half-way kneeling while at prayer in church. This conduct became so general that it became the subject of legislation. On June 21, 1587, the Session enacted that all persons present in church, in time of prayer, should bow the knee to the ground.

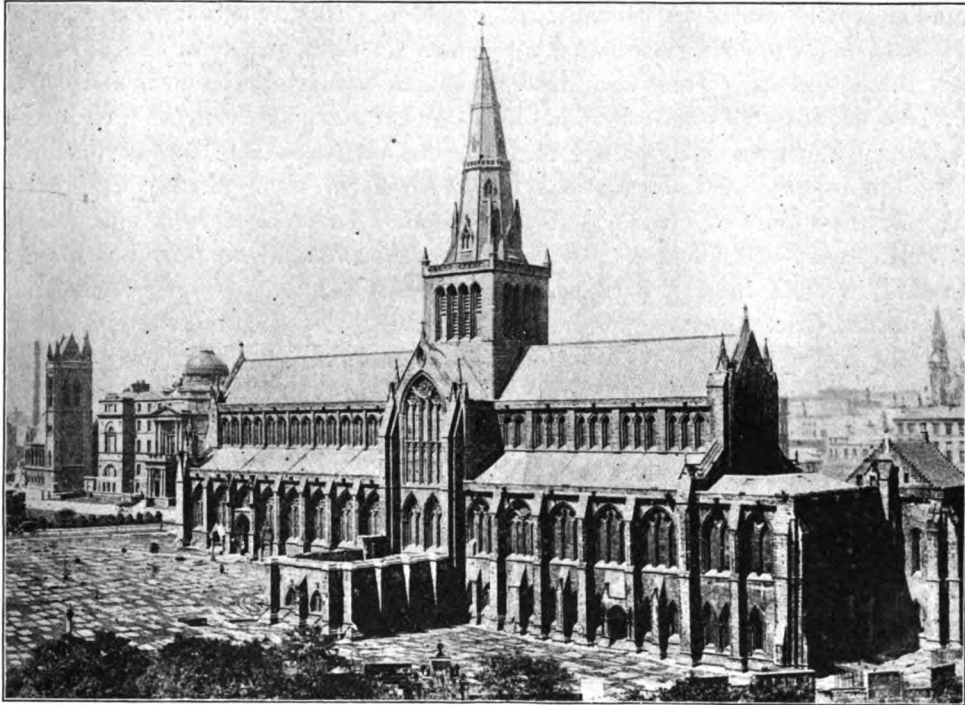
About this time, the female contingent began to be too pressing in their privileges to conform to the well known injunctions of Paul. The ladies received a severe legisla-

<sup>1</sup>In each case, my authority for these laws is the records of the Kirk Session of Glasgow and the records of the old Town Council, copies of which are preserved in the local libraries. In the case of ecclesiastical legislation, I conform my language to the original as far as practical.

tive setback on July 10, 1589, when the Session enacted that no woman should occupy the forms that the men should sit on, but should either "sit laigh" or else bring stools.

At about this period, the church services oft took the animated appearance of a political convention in America or of a meeting

dominie went to the Hie Kirk on his first Sabbath morning to preach, he found the congregation already gathered listening to a sermon by one Reverend Howie. The new Archbishop, after vainly demanding his rights, appealed to Sir Matthew Stewart, the Lord Provost of the city, who was present. Sir Matthew at once ascended into the pul-



THE OLD HIE KIRK OF GLASGOW.

*From a photograph made expressly for this article.*

of the Board of Aldermen of Chicago. In 1581, the King appointed one Richard Montgomery to be Archbishop of Glasgow and consequently the supreme power in the Hie Kirk on the hill.

There was some doubt regarding the moral character of the new Archbishop, as well as regarding the soundness of his theological views. Accordingly, the people opposed the appointment, and when the

pit, pulled the squatter preacher out by his whiskers and knocked several teeth down his throat. The loss of several good teeth and a handful of whiskers so enraged Reverend Howie that he then and there solemnly pronounced the judgment of God on the Lord Provost, his family and posterity. It is later recorded that, in consequence of this malediction, the posterity of Sir Matthew died in poverty and want.

Even the communion season was not noted for its orderly conduct at all times, partly owing, perhaps, to the liberal supply of liquid joy provided. The supplies for a communion season were of a most extensive character. On August 9, 1589, Walter Prior, Taxman of the Teens, Parsonage of Glasgow, was ordered by the Hie Kirk Session to provide a hogshead of wine for the communion which was to be celebrated in the Hie Kirk on the following Sabbath morning at three o'clock. This enthusiastic method of celebrating the communion naturally resulted in further whisker-pulling matinees and impromptu dental operations of the Sir Matthew Stewart type, a state of affairs which finally made necessary further legislation. In 1644, the Hie Kirk Session issued a formal order directing the magistrates of the city to attend the communion seasons in their official capacity "to keep order."

#### SUNDAY CLOSING LEGISLATION.

Laws regarding the Sabbath day were of a most comprehensive character. In 1594, it became necessary for the Presbytery to take action on the subject of ungodly bagpipes, and a law was enacted forbidding the playing of these instruments on Sundays.

In 1608, the Session enacted a further law providing that no drink, wine or ale should be sold during time of sermon under penalty of twenty pounds.

In 1640, the session ordered the Port of Glasgow to be closed on the Sabbath. Thus ungodly commerce received a check.

In the year 1646, the Session enacted a law providing that no horse meat should be cried on the streets on the Sabbath, and that no water should be brought in after the first bell.

Two years later (1648) the Session passed a law regarding the behavior of cattle on the Sabbath day. It was decreed that

no cattle should be kept out of doors on Sundays, except those in the town herd.

In 1641, the Session enacted a law against getting married on the Sabbath day. In addition to these were the general laws against labor and amusement on the Lord's day.

#### LAWS REGULATING THE BEHAVIOR OF DEACONS AND ELDERS.

It was deemed necessary that the deportment of deacons, elders and officers of the church should always be models of orderly conduct and good behavior. Unfortunately, these men were more or less human beings. Accordingly, their gaities and shortcomings frequently led to statutory enactments, that limitations might be put upon their joyful forays.

As early as 1583, the Town Council found it necessary to enact a law providing that elders and deacons found at banquets should be fined the sum of eighteen pence for each offense.

Not only were the deacons and elders themselves required to be good, but they were required to see that others also behaved. On July 14, the Session authorized the elders and deacons to visit the change houses at ten o'clock Saturday nights and "delate" drinkers and houses to the magistrates.

#### MARRIAGE AND DIVORCE LEGISLATION.

Legislation regarding marriage and divorce received especial attention. The law against Sunday marriages has already been mentioned.

On December 20, 1591, an elaborate law concerning the qualifications of candidates for matrimony was enacted by the Session. It was decreed that no proclamation of the banns should be celebrated without the consent of the parents. Those to be married were, moreover, required to be able to repeat the Lord's Prayer, the Ten Commandments,

and the Articles of Faith, or be formally declared to be unworthy to be joined in marriage.

This educational test worked hardship on some of the unlearned. The first wedding after the enactment of this law caught the groom in an embarrassing fix. He had forgotten the Articles of Faith. As it was his first offense, the authorities consented to stop the wedding and wait while the youth committed the Articles to memory, and thus save his reputation.

During the year 1583, the Session enacted a law prohibiting superfluous gatherings at wedding festivals and fixing the maximum cost of a wedding feast at eighteen pence.

On December 19, 1593, the session enacted a law forbidding the observance of Zuil (Christmas), declaring it to be a pagan festival, debarring offenders from the communion and prohibiting them from getting married.

In 1645 a law was passed forbidding quarrels between man and wife. The statute provided that the guilty pair should be publicly rebuked for the first offense. For the second quarrel, both were sentenced to stand at the door of the Hie Kirk between the second and third bell, each with a piece of paper pasted across the forehead.

Divorce was granted in a ceremonious fashion. The usual plan of procedure was to put the wife out one door of the Kirk and the husband out the other. That constituted the ceremony of divorce.

The laws of the Session for 1586 provided uncomfortable punishments for those found guilty of violating their marriage vows. Those found guilty of adultery were to stand at the pillar for six Sabbaths, bare-footed, bare-legged, clad only in sackcloth, and be carted through the town besides.

In case of a relapse thereafter, the culprit was to be taken to church at six o'clock in the

morning, after the first bell, by two deacons or any other honest men, and stand at the Kirk door, bare-footed and bare-headed, with a white wand in the hand, and there stand till after the reading of the text. Then the sinner was to go to the pillar and there remain till the sermon was over. Thereupon he was to again stand at the church door while the people walked past him on their way home. The offender was required to undergo this salubrious sort of penance for six successive Sabbaths.

In 1594 a law was passed for the benefit of ordinary harlots. Wide discretion was permitted under this statute. They could either be carted publicly through the streets, be required to stand for a time on a cockstool at the pillar or be ducked in the river Clyde, a rope and pulley having been arranged on the bridge for that purpose.

The offense of smoooring (smothering) children was lightly regarded as compared with such heinous crimes as breaking the Sabbath. The Session law of 1592 punished those guilty of smoooring children, by compelling them to stand in sackcloth at the Kirk door for two successive Sabbaths.

The excise laws were mainly confined to forbidding the sale of liquor during the sermon of Sundays and to fixing the price of ale and wine. In 1560 the Town Council enacted that the price of the best ale should not exceed four pennies, Scots, for a Scotch pint.

In 1569 the maximum price of wine was fixed at eighteen pennies, Scots, for a Scotch pint.

The offense of slander also received attention. In 1601, the Session passed a law against speaking ill of the dead. On May 7, 1607, the same authority enacted that any servant found guilty of slandering any honest man or woman should stand in the jugs on Monday.

But this century of unique law-making was rudely interrupted, in 1650, by Oliver Cromwell, who was sent by Parliament to be Captain-General over the Scots. When this occurred, the venerable Pat Gillespie was pastor of the Hie Kirk and was sent for by Cromwell. The irate preacher dared not refuse and went, but got even with the Captain-General by delivering a prayer to him of enormous length.

Cromwell silently endured the affliction,

and later invited the preacher to a feast. The Captain-General drew out the function to a great length and finally wound up the affair by making a prayer three hours long. This settled the account with the preacher.

Though these old laws have long since passed away, the Hie Kirk still transacts business at the old stand on the hill, and the Taxman of the Teens still survives to exact tribute from the taxpayers for the support of the Established Church.

## THE JURY SYSTEM IN PORTO RICO.

BY E. L. MACRAY.

**I**N Porto Rico, under Spanish domination, as most American lawyers know very well, cases were never tried by a jury. All the courts in those days were composed of three or more judges each, and the evidence was put before them in the form of affidavits or depositions and other documents having equal weight. The taking of testimony was generally performed by officers having no immediate connection with the trial courts, and when it was completed, an "expediente," or record, was formed, embodying the whole case in a manuscript volume, which was laid before the judges for their consideration on the trial.

During the military government, the United States Provisional Court organized juries on the American plan, and tried cases before them, with more or less success.

In his first message to the Legislative Assembly, Governor Allen, on the third of December, 1900, called attention to the desirability of jury trials in felony cases, and earnestly recommended such a plan for adoption. He said: "I believe you will find it expedient to adopt a system of trial by jury without great delay. It will be a

radical innovation, yet will carry with it the weight of generations of experience in lands where the liberty of the citizen is most sacredly guarded. That the people may study its operation, it occurs to me that it may well be restricted for a time to criminal cases, where the charge against the accused requires, if he is convicted, a long term in the penitentiary or capital punishment. With a prudent law for the selection of the jury, so as to insure jury panels which include good citizens who have tangible material interests in the Government, I believe that great good will follow from the experiment."

Secretary Hunt, then President of the Executive Council, and now Governor of Porto Rico, at once prepared and introduced Council Bill No. 1, styled "An Act to establish trial by jury in Porto Rico," which was the first law passed by the First Legislative Assembly of Porto Rico, and received the Executive approval on the twelfth of January, 1901. This Act provided for a trial by jury in criminal cases only, in which capital punishment or over two years confinement in prison might be inflicted. The Act went in-

to effect on the first of April following. On the thirty-first of January, an elaborate law concerning procedure in jury trials, emanating from the same source, was passed and approved, likewise to take effect on the first of April, supplementing the first act in regard to juries.

On the organization of civil government, a United States District Court for the Island had been organized, under the judicial presidency of Honorable William H. Holt, formerly a distinguished member of the Court of Appeals of the State of Kentucky. In this court, jury trials in both civil and criminal cases have been constantly practised. The business in the Federal Court, as it is called, is conducted almost entirely by continental lawyers, perfectly familiar with jury procedure. The jurors themselves are composed of resident Americans from the States, and of Porto Ricans who are more or less familiar with the English language. As all business in this court is conducted in English, this is a prerequisite qualification for a juror. It has sometimes been difficult to find competent men having this and other necessary qualifications to do jury service in the Federal Court. And besides, jury duty being entirely novel to the natives of Porto Rico, it will require some time for them to become accustomed to the business. As the Federal Court only submits the question of "guilty" or "not guilty," reserving the amount of punishment to be fixed by the judge, there seems to be a disposition on the part of some of the jurors to hesitate in finding a defendant guilty, for fear the judge may impose a very severe sentence. And possibly the experience of persons accused in the Federal Court, who have had the misfortune to be sentenced by the United States district judge, justifies this apprehension. It is very difficult to make the Federal jurors in Porto Rico understand that they are

in such proceedings only deciding an abstract question, and that there is a vast difference between the province of a court and that of a jury. This lesson is one which even continental jurors are sometimes slow to learn. However, taking into consideration the history of the Federal Courts in Porto Rico, both the provisional court and that permanently established under the Foraker law, there is no great reason to be much discouraged by the outcome of jury trials. The jurors show themselves willing in the main to do their duty to the best of their understanding, and after a while will probably not fall much below the general average of jurors in the larger cities of the United States.

Great hopes were entertained by continental lawyers of what could be accomplished in jury trials in the insular courts; and the present laws which restrict the province of the jury to criminal cases were regarded as a mere experiment. It was thought that it would not be long before civil, as well as criminal, cases would be tried before a jury of "twelve honest and intelligent men," after the manner of courts in the United States. But the insular lawyers do not seem to take kindly to this innovation. There is scarcely a case on record in which a jury has been demanded by a native attorney. They seem satisfied to rest the lives and liberties of their clients with the Bench, and prefer the old routine of making technical objections, and molding the evidence as best they can, to shield those who are so unfortunate as to be accused of crime. In fact, the courts, which are composed of eight-tenths of Porto Ricans, exhibit a little tardiness in organizing juries, and in getting down to business under the new system. Out of fifteen district judges in the island, there are only three Americans, and these have not been able, as yet, successfully to

put in practice the jury laws. In fact, some of the continental lawyers are becoming discouraged about fully introducing the system into the island for some time to come. If there were a good American lawyer on every district bench in the island, and such lawyers would enter the practice more generally in the insular courts, the jury system might be organized and generally practised at a much earlier day than seems likely to be the case at present.

The Code of Civil Procedure, which has been in force for years under the Spaniards, and has been so far continued under the Americans, is still in full vigor. However, the last session of the Legislative Assembly passed a political code, a civil code, a criminal code, and code of criminal procedure; the two latter being closely modeled on American lines. In fact, a large proportion of these criminal laws are copied from the California Code, and other statutes of the several American States. This being the case, and these laws having gone into effect on the first of July, many of the native judges and lawyers are giving considerable attention to the study of the new system; and perhaps jury trials will receive a fresh impetus as soon as the summer vacations are over.

A change from the code system under the civil law as it existed under the Spanish domination in Porto Rico, to the jury system under the common law, as it exists in the

United States, is a very thorough and radical one, and cannot be accomplished in the course of a few months. In the first place, the judges have to be impressed with the benefit of the reform, then the "fiscals," or prosecuting attorneys, must take the matter up with zeal and earnestness, and the great bulk of practising lawyers must be in sympathy and harmony with the movement, else its progress will be retarded at every step.

Probably there are other fields more inviting for the propagation of American ideas in Porto Rico than that under consideration. As long as the life, the liberty, and the property of the inhabitants are protected by an upright and intelligent administration of wholesome and salutary laws, no one is likely to make any great outcry against the lack of jury trials. In fact, as American lawyers very well know, there is a large element in the United States among the best business men, who consider jury trials in civil cases more of a hindrance than a help. Such being the case, it is not to be wondered at that the proportion of people entertaining such views is much larger in this island, which has been so recently a province of Spain. However, as American civilization advances, and American ideas supersede the worn out customs of the Spanish peninsula, doubtless American practice in the administration of justice, including the jury system as based on the ancient laws of our ancestors, will be adopted in full vigor.



**MISTAKEN IDENTITY.**

BY A MEMBER OF THE BAR.

THE fallibility of human knowledge and likelihood of honest witnesses to mistake is, of course, known and recognized by all, but especially is it brought to the attention of members of our profession. More particularly is it true on the question of identity.

All lawyers know that the reports are filled with cases where innocent persons have been convicted, and in some cases executed, because they were taken, in fact proven, so far as human testimony is concerned, to be some one else. In many instances the mistake was discovered too late to admit of amends.

The public will doubtless recall the noted "Hillman Insurance Case," where the simple question of identity of a dead body caused such an endless amount of litigation, and where a long list of witnesses, who we must presume were honest, swore positively that the body was that of Hillman, while an equal number, quite as creditable, swore just as positively that it was not.

Many will remember the account given us by the daily press of the finding of the body of a girl who had been drowned, I believe somewhere in New Jersey, and whose own father and mother identified the body as that of their daughter who had mysteriously disappeared, and would probably have continued in such belief, but for the appearance of the missing one in time to prevent her own funeral.

These are but two instances of a vast number which could be recalled as happening within the last few years. In some of the cases perjury may enter into it quite large, in others the mutilated or decomposed condition of the body renders it un-

certain, while in others the opportunity to observe accurately is not afforded. But I wonder if the public realize how often honest witnesses, with every opportunity to observe, are honestly mistaken in this class of testimony.

It has come under my own observation several times. One of the most striking cases occurred a few years ago.

In 1898 New Mexico and Arizona were infested with one of the most noted and daring gangs of outlaws which it has ever been the misfortune of any country to have. They had collectively and individually been guilty of all the crimes in the criminal calendar. Robbery of post-offices, railroads and express trains had become so frequent as hardly to cause comment. It had aroused the Government to such an extent that "marshals' posses" were scattered all over both the Territories. Railroads and express trains were carrying special armed guards. The crimes of the gang were so numerous, and such large rewards placed upon their heads, that they were desperate to the point where they did not attempt to conceal their identity. They succeeded in evading capture for a long time by rapid movements from one Territory to another, through the portions which were sparsely settled, and when "hard pressed" by crossing the line into Old Mexico. Their descriptions were accurately and minutely given. The leader of the gang was a man known as "Black Jack."

On the fifteenth of June, 1898, "Black Jack," George Musgrave, and another one of their followers perpetrated a cold-blooded murder in Lincoln County, New Mexico, by killing an inoffensive ranchman,



who has incurred the enmity of Musgrave some years before. After committing this crime, they started across the country, pursued by the officers of that county.

Through the section of country which they passed—miles away from any railroad—was operated a daily stage line from the town of San Antonio to White Oaks, which carried mail and express. They “held up” the eastbound stage on this line and robbed the mail and express. The stage was driven by a young man named Carpenter, who was of more than ordinary intelligence, and who, I believe, is now teaching school somewhere in Texas. It was about nine o'clock at night, but extremely bright moonlight. The westbound stage would not pass that point until about three hours later, so after robbing this stage the outlaws made themselves quite at home with the driver, ate his lunch and conversed with him quite freely; they wore no sort of disguises, and did not in any manner attempt to conceal their identity. They stayed with him until the westbound stage came along, which they also held up and robbed. This stage had a driver and one passenger, both men of ordinary intelligence, and of good reputation for truth and veracity.

After robbing this second stage they stayed for some thirty minutes longer and mingled freely with the other two men, who, of course, had excellent opportunity to observe them. When they left they took all of the stage horses, and left the drivers and passengers on the plains some ten miles from the nearest house.

The subsequent trailing showed that they went direct from the point where they robbed the stages to the stage station, where there was no one excepting the wife of the keeper, a Mexican woman. She afterwards stated that three men came to

the station about one o'clock in the morning and stopped for a few minutes. She saw them plainly by the light of a large fireplace.

From there they went south into Grant County, and a few weeks later a fight took place between them and the officers, and one of what was supposed to be the same outlaws, was killed.

Some months afterwards, Carpenter, the stage-driver, was in El Paso, Texas, and saw on the streets a man whom he recognized as one of the men who robbed the stage, who was thought to be “Black Jack.” He at once informed the United States officials, and the man was arrested and brought to the jail at Socorro, New Mexico. Naturally the arrest of so important a prisoner caused great rejoicing and the utmost activity on the part of the Federal officials to see that he was punished for his many misdeeds.

It was some months before he could be brought to trial, owing to the lapsing of a United States term of court, and during this time he continued in jail. His case was finally set down for trial and at the last moment Judge F—— and myself were appointed by the Court to defend him, as he was entirely without means.

After seeing and talking with the prisoner, we became convinced that the Government was mistaken, and that they had the wrong man. He told us a “straight-forward story” as to his whereabouts and doings. On the night of the robbery he said that he was on a freight train, with a certain conductor, naming him, between two points in Arizona, which was several hundred miles from the scene of the robbery; that the next day he started to work for a contractor in Phoenix, Arizona, giving his name.

Our appointment was made at rather a

late date to properly prepare his case for trial, but we used our utmost endeavor to procure the two witnesses to establish his "alibi," but without avail, for we found that the conductor was taking a vacation in California and could not be reached in time, and that the Phoenix contractor had gone to Klondike. The United States was all ready and urging a trial. Things looked bad for the prisoner, and we frankly told him so, but as he had been in jail for such a length of time, he was unwilling for us to try for a continuance, but insisted upon a trial, expressing himself as willing to assume all responsibility of the outcome.

The trial was had; Carpenter, the stage-driver, testified in the most positive manner, that the prisoner was one of the men who committed the robbery; that he could not be mistaken; that he had every opportunity to observe; that he picked him out of the crowded street of El Paso. The other stage-driver fully corroborated Carpenter. The passenger said, that if the prisoner was not the man, he never saw two men look so much alike. The prosecution was vigorously pushed by an able United States Attorney and his assistant.

The testimony left us in desperate straits. We did the only thing possible with the witnesses for the government, — on cross-examination succeeded in getting them too positive (which is a mistake often made by

witnesses); they even swore they could recognize the color of the eyes by moonlight, — a physical impossibility. The fact was established by them that the robber had no noticeable physical defect, — the prisoner was quite hard of hearing, and as we proved had been for several years; also we showed some slight discrepancy between the description, as given by them the next day after robbery, and the prisoner. We proved by the Mexican woman that the prisoner was not one of the three men who came to the station house the morning, or rather the night, of the "hold up." But the strange part of her testimony was not developed on the witness stand, for she would have sworn, had she been asked, that the man who was supposed to resemble the prisoner had heavy whiskers. This must have been pure imagination, for the uncontradicted proof was, that before, at, and after the robbery, none of them had whiskers.

The defendant told his story, and fortunately for the cause of justice the jury believed him and he was acquitted. It was afterwards found out from the conductor that the prisoner's story was true.

The real "Black Jack" was captured some time later, tried, convicted and executed.

If three witnesses, under the conditions recited, can be mistaken, how unsafe is the testimony of identity.



## THE STRANGE CASE OF DR. CREAM.

BY H. GERALD CHAPIN.

A DECADE ago, there was arraigned before an English judge and jury, one whose character must ever present to criminologists an enigma well nigh hopeless of solution. Imagine a being utterly devoid of sympathy, a moral and spiritual imbecile, whose sole delight is in witnessing the suffering of others—who murders by a slow and painful process human beings whom he does not even know, not for the sake of any benefit to be obtained, not for revenge, but prompted solely by a fiendish gloating over another's agony. Even in fiction, the hideous Frankenstein or the yet more terrible Hyde, types of all that is repellant to our nature, possessed some softened moments when we might pity. But this being, more weird and terrible than the wildest creation of a Shelley, a Stevenson or a Poe, was so entirely compounded of all evil that we can only shudder at nature's frightful handiwork. After all the author's researches into the dark realm of crime he has yet to find a case which even approximates to the present.

Several years before this story opens, the gates of a Canadian prison vomited forth one Dr. Thomas Neill Cream, who had served a nine years' sentence for the most atrocious murder of a patient. This crime in itself presents nothing novel either in design or execution. The physician had prescribed a harmless powder. A substitution of strychnine was easily accomplished. The true cause of death was unsuspected and detection might never have resulted had it not been that the homicide sought to utilize his crime as a means of extorting blackmail. The druggist was notified that he had made an error in the prescription and a large sum asked as the price of silence.

Knowing full well that his innocence might be easily established, for it was shown that at the time in question there was no poison kept on hand in his shop, the latter refused to accede to the demand. Cream thereupon laid before the Coroner a statement of his charges. He had, however, played his cards so badly that although the body was exhumed and traces of strychnine found in the stomach, suspicion fell upon the accuser himself and a subsequent trial ended in his conviction. Upon his release from jail he practised for some time among fallen women in Canada and in the United States, and finally in October, 1891, left for England.

Soon after his arrival, all London was startled by a series of the most atrocious and apparently motiveless crimes. Ellen Donworth, a woman of the unfortunate class, fell down in the street writhing in convulsions. She was taken to St. Thomas's Hospital, but died on the way. A careful examination of the contents of the stomach revealed traces of strychnine and morphia.

In the same month, there were living at the Orient buildings facing into the Hercules Road, two women by the names of Elizabeth Masters and Elizabeth May. At the Ludgate Circus one stormy evening, the former became acquainted with a man of medium height, big head and broad shoulders, with a reddish beard and bushy eyebrows. A cast in the eye gave him a somewhat sinister appearance. His expression was a forbidding one and an almost continual frown had worn a delta-shaped hollow over the nose. Once seen, his face was not likely to be forgotten. In age, he appeared slightly over forty. An acquaintance was quickly formed and several music halls visited. He received an invita-

tion to call, and on the following Friday Miss Masters was handed a letter in which the writer stated that he would see her that day between three and five o'clock. At the time appointed, both women were seated at the window looking into the street when they noticed one Matilda Clover walking toward the Lambeth Road. Cream was following and they observed the woman turn and smile. The two girls put on their hats and walked quickly after. Clover stood at the door of the house where she lived, looking towards the man, who came up to her, followed her into the house and the door closed behind them. After waiting for half an hour they went away.

A few days later Elizabeth May again saw the couple together.

At the lodgings where Matilda Clover and her illegitimate child resided, there was a servant, one Lucy Rose. On the morning of the 20th she found in her lodger's room an open letter in which the writer, whose name she did not recall, invited the recipient to meet him outside the Canterbury Hall at 7.30 that evening. Lucy assisted her to put the child to bed and Miss Clover left the house a little after seven. Later she returned accompanied by Cream who remained with her for some time. Clover subsequently went out again to ply her trade and returned early in the morning between one and two o'clock.

An hour later, the house was roused by the shrieks of one in dreadful agony. The unfortunate was found lying across the bed, her head wedged in between it and the wall. A medical man, hastily summoned, attributed the illness to alcoholism, knowing that the woman was much addicted to drink, and treated her accordingly. This, despite the fact that delirium tremens differs from strychnine poisoning in many important particulars. Notably the mind is clouded in

the former case while in the latter it is clear. The character of the convulsions also differs considerably. After frightful agony enduring for over four hours, the victim ceased to suffer. Dr. Graham, her regular physician, under circumstances of the greatest culpability, signed a death certificate in which it was stated that he had attended her during the last illness. On October 22, Matilda Clover was buried at Tooting by the parish authorities. She had reached the last stage of the painful road which fate had marked out for her. Her wretched and obscure life had ended and she rested in a pauper's grave, remembered but by few. Only one knew that a fearful tragedy had been enacted and that was he who had administered the fatal dose.

On November 28, Cream wrote a letter in the assumed name of "M. Malone" to Dr. Broadbent, a man of high eminence in his profession, in which it was stated that certain incriminating letters had been found by him among Clover's effects. The modest sum of £2,500 was fixed as their value. "If you don't want the evidence," he said, "of course it will be turned over to the police at once and your ruin will surely follow. Think well before you decide on this matter. It is just this, — £2,500 sterling on one hand, and ruin, shame, and disgrace on the other. Answer by personal on the first page of the *Daily Chronicle* any time next week. I am not humbugging you and I have evidence strong enough to ruin you forever."

It is exceedingly important to bear in mind that there was here a charge of death by strychnine poisoning made at a time when no one suspected it to have been the instrument of death. Dr. Broadbent turned the letter over to the police and pursuant to their instructions an answer was inserted in the *Chronicle*, but strange to say nothing came of it.

Another blackmailing letter was sent to one Frederick Smith demanding that "H. Bayne," an alleged barrister, be retained to clear him from a charge of having murdered Ellen Donworth. A day rarely passes in which the police do not receive one or more communications evidently emanating from individuals of the so-called "crank" type in which the most preposterous charges are made. It was at first thought that the present letter was one of that class.

In January, 1892, Cream sailed for America. He was then engaged to be married to an estimable young lady, Laura Sabatini. In April he returned to London. Before the end of that month two other deaths had occurred, those of Emma Shrivell and Alice Marsh, both fallen women.

On April 12, at about two o'clock in the morning, a constable named Conley was patrolling his beat in Stamford street. He saw the door of number 118 open and a young woman bade a man, whose appearance corresponded with that of the acquaintance of Masters and May, an affectionate good night. Nearly three hours later, the landlord of the premises called in Constable Eversfield. When he arrived, he found the two women writhing in tetanic convulsions. They were put into cabs and taken to the hospital. Marsh died on the way, Shrivell in the hospital after prolonged suffering.

At the house where Cream was staying, there lived a young physician named Harper. On April 25, his father received a communication similar in tenor to those previously addressed to Dr. Broadbent and Mr. Smith. The deaths of the two unfortunates were charged to the young man and £1,500 sterling demanded.

Coroner Wyatt of London, on the second or third of May, received a letter signed "A. O'Brien, detective," offering for sale at the price of £3,000 "such evidence as would

bring to justice the murderer of Ellen Donworth." Enclosed was a missive to the foreman of the Coroner's jury at the inquest of Marsh and Shrivell, signed "William H. Murray," in which it was stated that "one of my operators has positive proof that Walter Harper, a medical student and a son of Dr. Harper of Bear Street, Barnstable, is responsible for the deaths of Alice Marsh and Emma Shrivell, as having poisoned these girls with strychnine; this proof you can have on paying my bill for services to George Clark, detective."

We must now depart from the chronological order of events and return to October of the preceding year while we speak of an attempt which illustrates the peculiar methods which the poisoner employed.

Louisa Harris, commonly known as Lou Harvey, lived in St. John's Wood. About October 21, she met Cream at the Alhambra and afterwards went with him to a hotel. In the morning, Cream noticed or affected to notice certain spots on her forehead and said that he would give her a few pills which would remove them. He made an appointment for that purpose to meet her on the Embankment the next evening at eight o'clock. This rendezvous she kept accompanied by Harvey, her paramour, who followed at a distance. Cream handed her some long capsules. These she took in one hand and made a pretense of swallowing, but in reality transferred them to the other. Cream was suspicious and asked her to show him her hands. She did this, letting the pills drop to the ground. He then hastily bade her good night and offered to call a cab. She refused, but expressed a wish to visit a music hall. Her acquaintance said that he had an appointment at St. Thomas' Hospital, but promised to join her at eleven o'clock. She kept the appointment and was at the hall, but he did not appear. He un-

doubtedly believed that the poison had already done its work, and in one or two instances he casually mentioned her to an acquaintance as having died. Some time afterwards she met and spoke to him, but he failed to recognize her. .

We have now considered a few of the atrocious murders which Cream either committed or attempted—a few because it is undoubtedly true that he was the author of many which have not nor will ever be brought to light. Evidence sufficient to establish the death of six unfortunate girls at his hands was obtained by the authorities at Scotland Yard. No one knows how large was the number in America.

In a confession made to one since dead, who stood in close touch with him, he told of the ghastly pastime in which he was wont to indulge during his practice as a physician in the latter country. When an unfortunate woman consulted him, he would give her a box containing thirteen capsules, the contents of twelve of which consisted of ergot or Indian hemp. The thirteenth was filled with strychnine. He would instruct her to take one of these every day until a cure had been effected. Then he would watch the newspapers and be on the alert for an item which would inform him of her death. Many died, but no suspicion fell upon the criminal because, even if the capsules were traced to him, an analysis of those remaining would reveal no results.

This morbid excitement seems to have been the chief if not the only motive in all Cream's murders. It became a horrible fascination with him to watch the press to see whether the victim had fallen a prey to his wiles.

It is said that "the wicked flee when no man pursueth," and the haunting sense of his many crimes seems to have pursued Dr. Cream as it inevitably follows everyone

who takes the life of his brother man. Call it what you will, there exists within us a moving force, an "Imp of the Perverse" which impels the homicide to demand, "Am I my brother's keeper?" long before a breath of suspicion is wafted towards him.

Emily Sleeper lived with her mother at 103 Lambeth Road, where Cream boarded. Somewhat of an intimacy ripened between them, and on the 9th of October Cream made the remark that he knew who had poisoned Matilda Clover. It was Lord Russell, he said. The Russell divorce case was a prominent topic of conversation at that time. After his return from America, he made a number of inquiries about the young Dr. Harper, and later on he said to Miss Sleeper that it was Dr. Harper who had poisoned Marsh and Shrivell. Cream, so the girl testified, seemed to be a very inquisitive man, continually thrusting himself into the affairs of others.

John Haynes, an engineer, who had made Cream's acquaintance through their mutual friend Armstead, a photographer, was likewise the recipient of many curious confidences. Cream told him that the young physician had murdered Marsh and Shrivell with strychnine, and said that the unfortunate women had received anonymous letters warning them not to take anything from him. He mentioned incidentally at the time, that Harper had not alone poisoned Marsh and Shrivell but also Ellen Donworth, Matilda Clover and Lou Harvey, and asked Haynes to make inquiries. He claimed to be on terms of the greatest friendship with Harper and stated that the latter had asked him to procure strychnine for the purpose of poisoning those girls.

One of the witnesses whose testimony was introduced at the trial was that of a traveling salesman named McCullough who had made Cream's acquaintance in Quebec in the latter

part of February. They became somewhat friendly and Cream took him to his rooms and showed him some samples of pills and patent medicines. Opening a cash box Cream took out a wide-mouthed bottle containing strychnine and boasted of his ability to poison without detection. McCullough very naively testified, "I lost confidence in him (*sic*) through a conversation about an American who had come over with plenty of money. Cream said he ought to have had that man's money and I asked him, 'How is that?' and he said, 'I could give that man a pill and put him to sleep and his money would have been mine.' I said, 'You would not kill a man for \$2,000, would you?' and he regretted he had not done so."

Through the photographer Armstead, Cream procured an introduction to Sergeant McIntyre of Scotland Yard to whom in the middle of May he complained of being shadowed and asked whether it was because of any belief as to his connection with the Donworth, Marsh, and Shrivell cases. (This "shadowing" seems to have been a delusion pure and simple on Cream's part, as he was in no way suspected.) McIntyre, after communicating with his superiors, arranged for a meeting at the Pheasant public-house. They talked the poisoning cases over. "Doctor," said McIntyre, "you appear to be pretty well posted in these matters." "Yes," answered Cream, "I have followed them closely in the medical journal. Being a medical man I take an interest in affairs of this kind." McIntyre then asked him for a general statement as to where he had stayed since his arrival in England and Cream promised to have it prepared on the following morning. Later, McIntyre was furnished with a partial statement and on the 26th the two met in the Lambeth Place Road. "I am going away to-day," said Cream, "at three o'clock. Will I be arrested if I do?" McIntyre told him that he could

not say, but that if he would accompany him to Scotland Yard, inquiries would be made. They proceeded together for a short distance, when Cream stopped and said, "I am suspicious of you and I believe you are playing me double." He declined to go further and threatened to consult a solicitor. So far removed was the criminal from any suspicion, that the police thought at first that he was being made the victim of a blackmailing attempt similar to that which had been practised on Drs. Broadbent and Harper. It was only his subsequent behavior which caused him to become a marked man. The many letters charging the use of strychnine, however, did have the effect of causing the police to suspect that the true cause of Matilda Clover's death was not alcoholism as assigned. Dr. Stevenson, lecturer on medical jurisprudence at Guy's Hospital and one of the analysers employed by the government, in the early part of May performed an autopsy on the exhumed body and discovered upon quantitative analysis, out of nearly two pounds of material, one-sixteenth of a grain of strychnine.

Toward the end of May, Inspector Tunbridge, to whom the case had been entrusted in consequence of Cream's complaint that he was being watched, called on the latter. Cream showed him a medicine case in which was contained a bottle labelled, "one-sixteenth grain strychnine." It was nearly full of pills. Tunbridge asked, "What are those pills composed of?" and Cream answered, "One-sixteenth of a grain of strychnine and sugar coating only." "At that rate," the inspector said, "this bottle contains quite a large quantity of strychnine and it would be highly dangerous that they should fall into the hands of the public in any quantity." Cream, who claimed to be the agent of a wholesale drug house, answered that it was not intended to sell them to the public directly but only

to chemists and surgeons who would dispense them in proper quantities.

After obtaining specimens of Cream's handwriting and comparing them with the Broadbent and Harper letters, the police concluded that a *prima facie* case of attempted blackmail had been made out, and on June 4 Cream was arrested charged with that offense. A search of the prisoner's lodgings revealed a case holding fifty-four bottles of pills, and of these bottles seven contained strychnine of medicinal quantities, taking pill by pill. One bottle was full and contained one hundred and sixty-eight pills of one twenty-second of a grain each. Empty five-grain capsules were found, each capable of containing a full score of these pills. Thus the prisoner was enabled to compound a dose of nearly a grain of the drug. A paper was also discovered bearing the address of Alice Marsh and Emma Shrivell.

It was now morally certain that the prisoner had been guilty of something more than attempted blackmail, and consequently, on July 18, Inspector Tunbridge charged him with the wilful murder of Matilda Clover.

Three months later the criminal was put upon trial for his life at the Old Bailey. The indictment was an omnibus one including the murder of the three girls, the attempted murder of Lou Harvey and the attempt at blackmail of Drs. Harper and Broadbent. Both prosecution and defense presented a strong array of counsel. The late Sir Charles Russell, then Attorney General, afterward Chief Justice of England, led for the former, Mr. Geoghegan for the latter.

As a result of some clever detective work, it was possible for the officers of Scotland Yard to lay bare a portion of Dr. Cream's trail. No testimony was offered by the defense, and after a trial which lasted four days the jury found the prisoner guilty of

Clover's murder. No right of criminal appeal exists in England, and there occurred no delay to the expiation of his many crimes.

So much for the facts of one of the most peculiar cases in the annals of criminal jurisprudence. What the mental state of Cream was, the author does not attempt to say. Before such a condition of utter depravity science stands aghast. The medical men appointed to inquire into the prisoner's mental condition declared him perfectly responsible. This, however, must needs count for very little, as their investigations were limited by the absurd test which the courts in their omnipotent discretion have seen fit to prescribe for the determination of a prisoner's sanity or insanity. That a man may be utterly irresponsible for his actions and should be so held even though he "knew the nature and quality of the act he was doing, or that he knew such act was wrong,"<sup>1</sup> needs no argument.

Had it not been for the blackmailing letters, one might almost be tempted to say that the case was one of homicidal mania, because of the absolutely purposeless character of the crimes, and yet this attempt to derive advantage from their commission seems somewhat inconsistent with the claim that Cream should be placed in that category. Probably Lombroso's theory of an instinctive criminal who commits offenses simply and purely because he cannot refrain, would be nearer the mark. Cream appears to have been actuated by the same motive which induces a mischievous boy to torture an unfortunate animal which may have fallen into his power. The Mephistophelian delight in witnessing the agony of others must place him in the class of a Roman

<sup>1</sup> Members of the legal profession are, of course, aware that this absurd test first laid down in McNaughten's case (10 C. & F. 200) has been repudiated by some of the courts of this country, notably in New Hampshire.



Commodus or Caligula, a Russian Ivan the Terrible, a Spanish Pedro the Cruel, or a Zulu Chaaka — creatures drunk with blood and intoxicated with suffering, before whose eyes nature is bathed in crimson light. Had Cream been born a few centuries

earlier, and placed in a position of power, he would have been as one of these. If there be aught of truth in theosophical theories, then perchance the soul of one of these vampires suffered re-incarnation in him.

### McCARTY WON HIS CASE.

CORNELIUS B. PALMER.

YOU could hear the rush and roar,  
Coming out the Court House door,  
When the verdict had been rendered by the jury.

The Justice rapped his table,  
The tipstaff was unable  
To stop the boys in their hilarious fury.  
Each one sought the foremost place  
In the scramble and the race ;  
At their head they bore McCarty,  
For McCarty won his case.

It was a hard fought battle,  
About a mortgaged chattel, —  
A black horse, owned by Ebenezer Morrill.  
By astute explanation  
On cross examination,  
A witness swore the mortgaged horse was sorrel.  
By the jury in an ace,  
(For they did not leave their place)  
The plaintiff was non-suited,  
And McCarty won his case.

Then straight down the village street,  
With a steady tramp of feet  
On their shoulders bore McCarty, to the inn ;  
For the crowd it was immense,  
The excitement was intense,  
And complacently McCarty heard the din ;  
With a calm unruffled face,  
He gazed around the place,  
After that wild and hurried race,  
For McCarty won his case.

And now, even till this day,  
So the oldest people say,  
As they sit around their hearthstone in the eve,  
Of all our legal glory,  
A Marshall, Kent, or Story,  
Jack McCarty was the greatest, they believe ;  
In that celebrated case,  
*In Re Morrill versus Mace*,  
His astuteness they will trace,  
How McCarty won his case.



THE TRIAL OF LADY ALICE KETTLE.

BY J. M. SULLIVAN.

THE punishment meted out to heretics in the early days was an extremely severe one, namely, burning at the stake. The earliest known trial for witchcraft, and the only one in the early days of which we have reliable and authentic information, was the trial of Lady Alice Kettle. A detailed account of the prosecution is as follows :

"About the year 1325 Lady Alice Kettle, together with her accomplices, Petronilla and Basilia, were summoned before the Bishop of Ossory to answer to charges of witchcraft, sorcery, and magic. They were accused of holding nightly conferences with an imp or evil spirit called 'Robin Artisson, to whom, in order to make the infernal thing obedient to all their commands, they sacrificed nine red cocks in the middle of the highway, and offered up the eyes of nine peacocks. The Lady Alice, by means of this imp and his associates, caused, every night, the streets of Kilkenny to be swept between the hours of compline prayer and day heats. But it was for the good of her greedy son, one William Utlaw, that she did this. William Utlaw was a great land pirate, an '*avarus agricola*,' who monopolized all the town parks, and grasped at great possessions. So the cunning mother had all the filth of the city raked to her son's door, to help him to manure his meadows, and such of the inhabitants as ventured to go out at night, heard unearthly brooms plying over the causeway, and fearful-looking scavengers were at their dirty work, and making of night hideous chanting unearthly and weird song. No sooner were the nine peacocks' eyes thrown

into the fire, than up rose Robin the imp, presented his potent mistress with a pot of ointment with which she oiled her broomstick ; and then, mounting as gay as Meg Merriles, the Scotch hag, and having along with her Petronilla and Basilia, her dear friends, she performed a night's journey in a minute, and used to hold a 'Sabbab' with other enchanterers on the Devil's Bit in the County of Tipperary."

This business made a great noise at the time. The Lady Alice Kettle, together with Basilia, having powerful friends, escaped to foreign parts ; her accomplice, Petronilla, was burned at the cross of Kilkenny. William Utlaw suffered a long imprisonment. On searching Lady Alice's closet (as Holingshed relates) they found a sacramental wafer, having Satan's name stamped thereon, and a pipe of ointment with which she greased her staff, when she would amble and gallop through thick and thin, through fair weather and foul, as she listed.

The town of Kilkenny appears to have been peculiarly fatal to witches. Sir Richard Cox, in his history of Ireland, mentions the visit of Sir William Drury, the Lord Deputy, to it, in October, 1578, who caused thirty-six criminals to be executed there, "one of which was a 'black-a-moor,' and two others were witches, and were condemned by the law of nature, for there was no positive law against witchcraft in these days." From that it would appear that the Statute 33 Henry VIII. against witchcraft had either become a dead letter or had not been enacted in Ireland.

**FRANCIS VARGA**

By F. G. MOORHEAD.

**F**RANCIS VARGA, Judge Advocate General of Louis Kossuth's provisional government in Hungary during the revolution of 1849, died at his home in Leon, Iowa, early in the month of April. Varga had lived in seclusion in the little Iowa town for the past fifty years, residing on land secured by a grant from President Fillmore, when the Hungarian refugees found shelter in America after being driven and buffeted all over Europe. Few remembered that Kossuth's chief advisers and counsellors were still alive; but in quietness and serving their adopted country as they had their fatherland, Francis Varga, Judge Advocate General of Hungary; Ladislaus Madarasz, for thirty years Secretary of State of Hungary; L. Ujhazy, Civil Governor of the fortress of Komorn; Baron Joseph Majthenyi, Secretary of the Hungarian House of Lords, and other Hungarian nobles and notables have resided for the past half century.

The story of Varga's life is a stirring one, and in his declining years the old Hungarian delighted to re-tell the story of the struggle of his native country, but he never told it without weeping bitterly for the defeat that was his country's portion. Although born a noble, and a statesman by years' training and experience, after coming to America Varga lived as a simple farmer, contented to accept the lowly offices that the people of his country (Decatur county, in Iowa) gave him. The last years of his life found him extremely feeble in body, but his mind was always clear; and sitting in his invalid's chair, to which he was confined for years, he would re-tell the story of Hungary's struggle, forced to stop now and then

until he could control his weeping and control his voice.

A short time before he died (at his funeral the bar of the Iowa county paid him the honors due to a judge of this land), Varga told for the last time the story of the Hungarian struggle and his participation therein. His story was taken down and runs as follows:

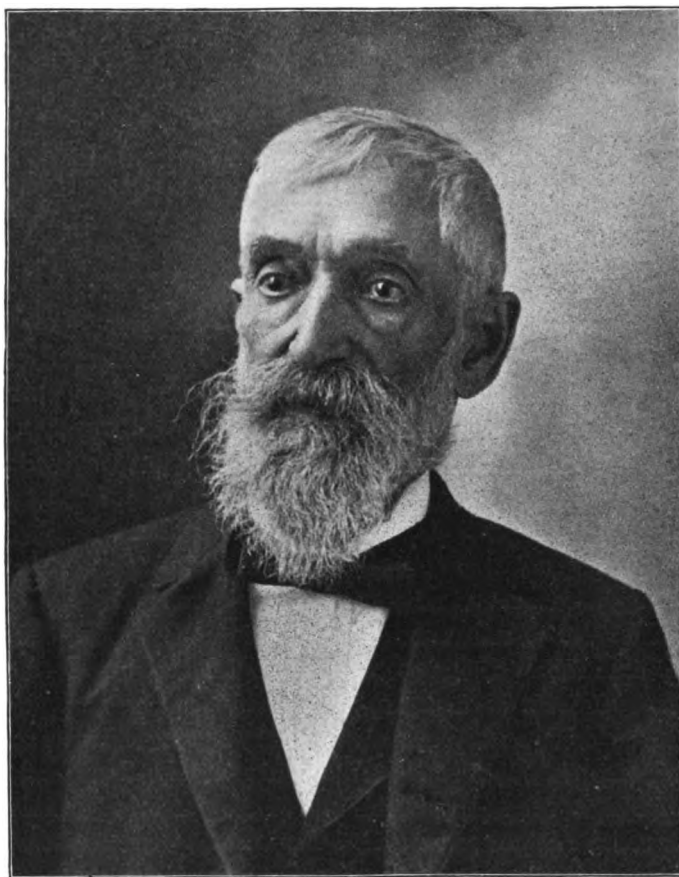
"The story of Hungary's struggle is short. For three hundred years Austria and Hungary had dwelt together, under one ruler, bound together through fear of the Turks and united resistance against them. Yet Hungary had her own constitution and was to preserve her separate rights; yet year by year the rights under Hungary's constitution were curtailed, and year by year Hungary lay crouching while Austria took the ascendant.

"At last came the struggle for the change—the change that did not come as we had hoped. An imbecile, a fool, was on the throne of Austria; dear sir, an imbecile. Why, let me tell you what an imbecile he was. A two-headed eagle is an emblem of Austria, typical of the double country. One day this imbecile's adjutant out hunting shot an eagle. The noble bird fell at the king's feet. 'See, sire, see, it is an eagle.' Ferdinand, the King, looked and quickly said: 'This is not an eagle, it has only one head.'

"Finally, in answer to our insistent demands, the Emperor went to the Hungarian Congress; he promised the reforms we asked, we were satisfied; we asked only to have our rights under the constitution restored; he gave back to Hungary the constitution that was hers by right. But the Emperor went back to Austria and the

royal family told him he had thrown away Hungary; they deposed him and crowned in his stead the son of his brother, Francis Joseph, who still governs over Austria and Hungary.

soldiers; we were defeated by Russian bayonets. Terrible atrocities were committed; the Austrians and Russian soldiers ravished and ravaged; children and old men and women were put to death; unborn babes



FRANCIS VARGA.

"Then came the revolution; my country demanded her rights; the Emperor had promised them; we fought for them. What did we ask? A responsible ministry, abolition of the feudal system, equalization of taxes, extension of the franchise, freedom of the press, complete religious toleration. Those are what we fought for.

"We were defeated, but not by Austrian

were cut from the bodies of their mothers. The atrocities were terrible. They were so great that when the Austrian ambassador was presented to the Queen of England she turned her back.

"Kossuth made me his Judge Advocate General; martial law had been established; it was war, war everywhere. The Court was established; I was the judge, and from my

decree there was no appeal. Inside of six months I put two hundred and sixty persons to death for those atrocities and barbarities. Within two hours after my decrees the men were dead, there was no hope for them.

"We were defeated. Our general, Hungary's general, General Gorgei, was a traitor. He laid down the Hungarian arms to Russia. Why? Because he was jealous of Kossuth. Kossuth fled; so did we all. Then began the search, the persecution.

"I was the last to leave Hungary; all the others had fled. I was hunted and hounded from place to place, a price on my head, my life in danger for eleven months; my country defeated and prostrate. At last I secured a passport from a lady, my cousin. Part was printed, part filled in with her description in writing. A doctor showed me how to erase the writing with chemicals. I did so, filled it in for myself and fled toward Germany. The passport was good only for Austria. I was told to go to Breslau simply to stay over night and that then I would not need a passport. I did so. I was hounded day and night as a radical. I knew not where to go. Finally I went to a doctor; he kept me for three days, and got me a passport as a merchant, and I fled to Dantzig. From there I fled to Hamburg, which was a free city, and there I hoped to be safe.

"There, alas, I was discovered; I was an Hungarian, one of Kossuth's men. The police sent for me. I told them I did not need any passport. They replied: 'You're a Hungarian. Austria and Russia will give us no peace if we shelter you. You must go.' Then I said: 'I pity you, you Republican government.'

"From one place to another, I spent six months in Germany, always on the alert, always in danger. Then came the Schleswig-Holstein war, and the Austrian soldiers came into Hamburg. I fled to London;

there I stayed six months, and finally came to America, and settled here in Iowa fifty years ago the twelfth of November."

The story of the establishment of the Russian settlement in Iowa was told by Varga. A fortress in Hungary, named Komorn, battled for a thousand years and in a thousand battles and never taken, was surrendered by General Klapka, of the Hungarian army. The military governor was removed and in his stead was appointed a civil governor, L. Ujhazy. Ujhazy was rich, he was a patriot, and with the final defeat of his country he refused to serve longer as Governor of Komorn. He demanded a passport from the country and it was granted. Then he started for America, bringing forty Hungarians with him. He and his followers were the first Hungarians to come to the United States for protection and shelter, after the revolution of '49, except a few scattered individuals.

Fillmore was president of this country then. Ujhazy visited Fillmore and pleaded the cause of the revolutionists seeking a home. Fillmore advised him to go to Iowa, a new country and a rich one. So Ujhazy and his followers came west, traveling by way of the Ohio and Mississippi rivers until they came to Burlington, Iowa, where they were given guides and started westward, overland, until they reached what is now Decatur county, and there they started the new Buda settlement, the Government giving them the option on the land. They chose Iowa because it was a non-slave state and the climate was mild.

Having settled and started a colony Ujhazy wrote to London and told his countrymen he had found a Paradise, and urged them to hurry on. Varga and his son, Ladislaus Madarasz and his son, Joseph Majthenyi (another statesman and high official), Ernest Drahos (who was a judge with

Varga) and the other Hungarian patriots and exiles left London and journeyed direct to Iowa. Their reception in New York was a notable one; the cause of Hungary was popular; Kossuth a hero, and the Austrian barbarities had shocked the whole world.

The colony started farming, the statesmen turned farmers. Madarasz had shared with Kossuth the highest honors. For thirty years he had been Secretary of State in Hungary; during the provisional government he had been a member (along with Kossuth and Nyary) of the committee of three to adjust matters of State, similar to the President's cabinet in this country.

"Madarasz signed our Declaration of Independence," continued Varga. "The Declaration we made April 14, 1849, but that we never celebrated. Majthenyi signed it too; he was Secretary of the House of Lords, he was a baron himself. Madarasz was the radical leader of our country. I myself was a noble. We had fought and failed; we came to this country to start life over again."

Varga tried farming, as did the others, but he was a failure as a farmer; still he stuck to it for thirteen years. The Civil War broke out, and all the Hungarians espoused the cause of the North. Decatur county was the battlefield between Missouri and Iowa, slavery and non-slavery. There was a meeting in Leon in the early days.

"Slavery is sanctioned by the Constitution," said Henry Clay Dean, leader of Democracy. "The Constitution says we can have slavery."

Varga, Hungarian, republican, rose and answered him.

"Let us have a new Constitution then; away with the old one."

For his services during the Civil War Varga was elected county clerk in 1864, and served four years; then he was elected county treasurer, and served six years; then eight years as deputy. When he took the treasury it had \$1.40 in it. The rich paid no taxes, county warrants were worth only fifty cents on the dollar. Varga brought about reforms; he was doing for the little county of farmers what he had hoped to do for all Hungary. He had given up his title and ownership of more land than is in Decatur county, to serve the people of a foreign land. Since 1881, Varga had worked as an abstractor. He was admitted to the Hungarian bar in 1840; he had been a lawyer for sixty-one years.

"The revolution of '49 made forty million serfs free," concluded Varga; "it abolished the feudal system, it extended the franchise; we succeeded partly, we had hoped for much more; but what we won can never be taken away from the people. I shall die happy.

"I am an Hungarian. I cannot live much longer. But I die an American as well as an Hungarian. Ah, how I love this country. It is as dear to me as my heart's blood. No one can better appreciate its liberty and freedom than I—than the exiles who came with me. We were denied freedom and liberty in our own country; we found it, we found it, dear sir, in this. We bless the land of liberty."

## INDIAN JAILS.

BY ANDREW T. SIBBALD.

THE term "an Indian jail" includes buildings of many sorts, from a massive fortress built by the Mahrattas or the Moguls, to a shed with mud or mat walls,

which has been run up in a few hours to meet the exigencies of the day. "A lock-up," as it is called, built with mats of split bamboo, is a more secure place of custody

than one with mud walls; for in the night a prisoner can dig his way through a mud wall with a knife or a sharpened bit of stick without making any noise, whereas the bamboo mat will creak or crackle as soon as it is touched, and so even the somnolent guard, or someone else, may be aroused. Some of the larger jails are built of brick and stone, and are calculated to hold four hundred persons, and are divided into ten or twelve wards, some of which are sub-divided. The ward is called the *Hájut*, but set apart for men under trial. Another ward is for females, and usually contains a few women and babies; for babies up to two years old sometimes went to jail with their mothers if the ladies wished it. The bulk of the male prisoners are divided into laboring and non-laboring. The latter, whose sentences do not condemn them to hard labor, live a life of idleness. They eat and sleep and smoke surreptitiously (tobacco not being allowed) until their sentences expire. They had to eat the jail's rations, which were as good and as abundant as the food they would have got in their own homes. Their only punishment was the loss of their liberty. There was, however, one risk. If they did not conform to the jail rules, or were in any way quarrelsome or troublesome, they were liable to punishment for a breach of jail discipline. In such a case they were usually provided with some hard labor, to teach them to behave better; but they might also receive corporal punishment, which frightened them. The laboring prisoners were subjected to a somewhat ruder classification. Murderers were kept with murderers, burglars with burglars, thieves with thieves, and so on. But as murderers were very few, they could not have a ward to themselves, and so they got mixed up with burglars.

These three classes were usually kept in fetters, according to the term of their judicial sentence. Formerly the laboring prisoners were put into heavy fetters, weighing seven pounds, and sent to work on the roads without any choice or question. The system of employing convicts to work on roads was an inheritance from the Mohammedan rulers whom the English succeeded in India. There is a high embanked road in the Hooghly district about ten miles long, which a ruler of the Hindoo dynasty is said to have made with prisoners some seven hundred years ago.

The fixed establishment of most of the large jails consists of a native jailor, with deputies and a few paid warders, with a semi-military guard for sentry duty, armed with muskets and provided with ammunition. They are commanded and drilled by a *Subahdar* (native officer.)

In every jail there is a hospital ward and dispensary, with a native doctor in charge of it; and there is a mortuary house for post-mortem examinations. Some of the well-behaved convicts are encouraged to become hospital compounders and dressers, and take to their new duties gladly. The civil surgeon of the station seldom fails to visit his jail every morning.

Some of the jails were old forts built by the Mohammedans and the Mahrattas. The old Mahratta fort at Midnapore, and the still older fortress at Monghyr, on the Ganges, had been appropriated as jails. Of course, so far as security is concerned, the walls of a fortress would serve well for the walls of a jail. But the internal arrangements were not so suitable, and the bomb-proof barracks and magazines with their low, solid roofs, were very bad for the prisoners who had to sleep in them. Some engineer, who had the building of jails in other districts, seems to have been struck

by the idea that a bomb-proof roof was the right thing to prevent prisoners from escaping, and so in those districts there were wards with bomb-proof roofs built under English rule. But a wiser system now prevails, and the bomb-proof roofs have been pierced and provided with ample ventilators. It may, however, be mentioned that the rivals of the English in India, the Danes and the French, had no idea of making their prisoners too comfortable in jail. When the Danish settlement of Serampore was made over to the English, they found some of the cells in the jail, eight feet long, six feet high, and three feet wide, with no light, or ventilation, or drainage. They were ironically called the "*thunda*" guard, or cool guard-room, whereas they were so intensely hot and malodorous that it would have been cruelty to keep a dog in them. It is said that prisoners were put into these cells by the Danes to make them confess their guilt. The English Government very soon ordered them to be pulled down.

With the progress of civilization the Indian Government organised a special Jail Department under an Inspector General of Jails. The magistrates were relieved of the charge of the local prisons, selected English officers being appointed to look after the large and central jails, and the Civil Surgeon becoming the responsible officer at most of the small stations. The Inspector General has usually been a member of the Medical Service, so that the health and sanitary condition of the prisoners have come specially into prominence. The magistrates and the other civilian officers were made visitors, and directed to make periodical inspections of the jails, and to note in the visitors' book any points on which they desired to offer remarks. There was a rule made that the visitor should

always be attended by a guard, with loaded muskets and fixed bayonets, during his walk through the jail, and thus it became rather a perilous job for the visitor, the guard being little used to handle firearms, though they might at some period in their lives have gone through their drill. A visitor who is supposed to see if the convicts have any complaint to offer, is not likely to inspire much confidence when he goes attended by the jail officials and surrounded by armed guards. Visitations, therefore, became rather a farce, except so far as the visitor could see or smell; and an experienced visitor would be careful to write very little in the visitors' book, unless he wished to be involved in a controversy with the Inspector General, who did not approve of anything being recorded in the book unfavorable to his own department subordinates.

When the Lieutenant-Governor of the Province visits a jail (as he always does in his annual tour through the district of his territories) it is announced beforehand at what hour and on what day the gubernatorial inspection will take place. The official visitor of more humble rank should, therefore, try to enable himself to see the interior of a jail in the same aspect as it is exhibited to a Lieutenant-Governor. Although "eye-wash" is not charged for in the jail accounts, a considerable quantity of it is used for the pre-announced visit of the Lieutenant-Governor or any other high official visitor; and it is much more pleasant to find the drains thoroughly cleaned, and the wards fragrant with the smoke of incense, than to have the senses of sight and smell offended in divers ways if the visitor calls unexpectedly at the gates of the jail, and insists on going in and seeing things in their *déshabille*.



## THE GREAT SEAL OF THE UNITED STATES.

THE Department of State is about to provide itself with a new and interesting piece of office furniture in the shape of a freshly cut "great seal of the United States," to replace the present old one, now so outworn with excessive use as no longer to make the proper impression upon the important state papers to which it must be attached. Provision was made expressly by Congress for the recutting, to cost \$1,250, on the recommendation of Secretary Hay, custodian of that indispensable implement, and the work is now in progress.

All the world over seals have been used from remote antiquity to authenticate the signatures of sovereigns and authorized public officers, and no adequate device has yet been invented to take their place. In the entire history of the United States heretofore only three great seals have been used, a new one of the same general pattern as its predecessor having been cut as each existing one became worn out. These three were cut, respectively, in the years 1782, 1841 and 1885.

The old worn-out seal now in use in the State Department was that cut in 1885, when Frederick Frelinghuysen was Secretary of State under President Arthur, after the design had first been submitted to historical scholars and authorities on heraldry and had been approved by them.

Its immediate predecessor, cut in 1841, when Daniel Webster served as Secretary of State under President Tyler, had a notable peculiarity, in that the eagle's left talon held but six arrows, instead of thirteen, as required by law, and differed otherwise from the original great seal in several minor details of drawing. The evolution of the original great seal, as it has come down to us

from the founders of the Republic, is full of interest and deserves particular mention.

This first and original great seal, cut in 1782 at Philadelphia, in exact conformity with the provisions of the Act of the old Congress of June 20 of that year, was the result of no end of study, experiment and revision, and was finally based upon designs, prepared and submitted, as the joint work of Charles Thomson, secretary of Congress, and William Barton of Philadelphia. The report made to Congress by Secretary Thomson and adopted officially by that body reads as follows:

"The device for an armorial achievement and reverse of the great seal for the United States in Congress assembled, is as follows:

"Arms. Paleways (upright stripes on shield) of thirteen pieces, argent (silver) and gules (red); the escutcheon on the breast of the American eagle displayed proper (in natural colors), holding in his dexter talon an olive branch, and in his sinister a bundle of thirteen arrows, all proper, and in his beak a scroll inscribed with this motto, *E Pluribus Unum*.

"For the crest. Over the head of the eagle, which appears above the escutcheon, a glory, or (gold) breaking through a cloud proper and surrounding thirteen stars forming a constellation argent (silver), on an azure (blue) field.

"Reverse. A pyramid unfinished.

"In the zenith, an eye in a triangle, surrounded with a glory proper. Over the eye these words, *Annuit Coeptis*. On the base of the pyramids the numerical letters, 'MDCCLXXVI.' And underneath the following motto, *Novus Ordo Seclorum*."

Accompanying this report, and forming

a part of it, was an interpretation of the symbols used, reading as follows:

"The escutcheon is composed of the chief (upper part of shield) and pale (perpendicular stripes), the two most honorable ordinaries. The pieces paly (stripes) represent the several States all joined in one solid compact entire, supporting a chief, which unites the whole and represents Congress. The motto alludes to this union. The pales in the arms are kept closely united by the chief, and the chief depends on that union and the strength resulting from it for its support, to denote the confederacy of the United States of America and the preservation of their union through Congress.

"The colors of the pales are those used in the flag of the United States of America: White signifies purity and innocence, red hardiness and valor, and blue, the color of the chief, signifies vigilance, perseverance and justice. The olive branch and arrows denote the power of peace and war, which is exclusively vested in Congress. The constellation denotes a new State taking its place and rank among other sovereign powers. The escutcheon is borne on the breast of an American eagle without any other supporters, to denote that the United States ought to rely on their own virtue.

"Reverse. The pyramid signifies strength and duration. The eye over it and the motto allude to the many signal interpositions of Providence in favor of the American cause. The date underneath is that of the Declaration of Independence, and the words under it signify the beginning of the new American era, which commences from that date."

The preliminary steps taken to design the national seal began appropriately on the Fourth of July, 1776, after the Decla-

ration of Independence had been read in the Continental Congress, when a resolution was offered and passed providing "that Dr. Franklin, Mr. J. Adams and Mr. Jefferson be a committee to prepare a device for a seal of the United States of North America."

The committee reported on August 10 following, a design embodying among other objects a shield in the centre, bearing six quarters, containing, respectively, a rose on a gold ground, a thistle on a silver ground, a harp on green, a fleur de luce on blue, a German black eagle on gold, and a Belgic lion on gold, as symbols representing England, Scotland, Ireland, France, Germany, and Holland, the countries whence the American States were chiefly peopled.

This shield was supported on either side by a female figure, the Goddess of Liberty at the right and the Goddess of Justice at the left, with a motto below, "*E Pluribus Unum*," and the whole encircled by a red border bearing thirteen small shields, labelled with the initial letters of the thirteen original States, and surmounted by a crest consisting of the "Eye of Providence," looking out from a radiant triangle. As an outer border was the legend in Roman capital letters: "Seal of the United States of America, MDCCLXXVI."

This design failed of acceptance; but it will be observed that two of its most important features were retained in the design finally adopted—the motto, "*E Pluribus Unum*," on the face side, and the "Eye of Providence" in a triangle on the reverse side.

The matter was referred to a new committee of three less distinguished members, Messrs. Lovell of Massachusetts, Scott of Virginia and Houstoun of Georgia. They reported on May 10, 1780, a device containing thirteen alternate red and white stripes, placed diagonally across a shield

surmounted by thirteen stars. These two features, it may be remarked, were also preserved in the final design, but the device as proposed was not accepted.

A third committee was thereupon appointed, consisting of Messrs. Middleton and Rutledge of South Carolina and Boudinot of New Jersey, and later Arthur Lee of Virginia was added. These gentlemen, making but slow progress, called to their aid William Barton, an ingenious and cultivated citizen of Philadelphia, familiar with the mysteries of heraldry, and within a short time he submitted a pyramid of thirteen layers, typifying the thirteen States, and this idea was preserved in the final design.

Charles Thomson, Secretary of Congress, then submitted a design of his own, which included a wide-winged American eagle with a shield on its breast and bearing in its right talon an olive branch, in its left a bundle of thirteen arrows. Above the bird he drew a constellation of thirteen stars, and in the eagle's beak he placed a scroll with the words "*E Pluribus Unum*."

For the reverse side he approved Barton's idea of an unfinished pyramid, and suggested the addition of an eye above it in a radiant triangle, as pictured by Messrs. Franklin, Adams and Jefferson. He proposed, besides, an inscription to surmount it, reading, "*Annuit Coeptis*," and an inscription below, "*MDCCLXXVI, Novus Ordo Seclorum*."

These were long strides toward the desired consummation. The Latin phrases, "*Annuit Coeptis*," meaning, "It (the Eye of Providence) favors our undertakings," and "*Novus Ordo Seclorum*," meaning "A new order of the centuries has begun," were doubtless inspired by passages in the Georgics and Eclogues of Virgil.

Mr. Barton in turn proceeded to revise Mr. Thomson's plans in some minor partic-

ulars, and the seal as decided upon was at last in shape.

The reverse side of the seal was not cut in 1782, when the face was engraved, nor has it ever been cut since. It could not conveniently be used for purposes of a seal, and therefore it has been allowed to go unnoticed to the present day.

This original great seal was used first by Congress. The oldest document that has been preserved bearing its imprint is a parchment commission dated Sept. 16, 1782, granting full power and authority to General Washington to arrange with the British for an exchange of prisoners of war, signed by John Hanson, President of Congress, and countersigned by Charles Thomson, Secretary. The seal, impressed upon the parchment over a white wafer fastened by red, was in the upper left-hand corner. The present method is to attach the seal to the lower left-hand corner of a document.

As adopted by the old Congress, the great seal was continued in force and effect by the present Federal Government under the Constitution by the Act of Congress of Sept. 15, 1789, creating the Department of State. Ever since it has been confined to the custody of the Secretary of State. He was at first required to affix it to all civil commissions of officers of the United States appointed by the President, either alone or with the advice and consent of the Senate, after the commissions had been signed by the President. The President's signature to an official instrument is regarded as a warrant in itself for affixing the great seal.

Later on, as the duties of the Government expanded, the practice of affixing the great seal to all commissions was gradually abandoned, and now it is required to be affixed only to the commissions of members

of the Cabinet and of our diplomatic and consular officers, to ceremonious communications from the President to foreign governments, to treaties, pardons, proclamations, *exequaturs* to foreign consular officers in this country, and to miscellaneous commissions of certain civil officers.

The commissions of postmasters are made out with the seal of the post-office department; commissions of officers of the interior department are made out with the seal of that department; likewise Federal judiciary officials, such as marshals and attorneys, are appointed under the seal of the department of justice.

In various countries nowadays the authenticity of a treaty with another power is attested by a large pendant wax seal, the cords that run through the paper being carried through the wax. As the wax

would otherwise be quite certain to break and the cords become detached, a metal box, usually of gold or silver, is used to cover and protect the wax impression. Our own great seal was thus attached to treaties up to the year 1869, when the practice was abandoned. The impression on the paper itself, with a thin white wafer, is used upon treaties as well as other instruments to which the seal is affixed.

In the new great seal, now cutting, there will be thirteen olives on the olive branch, and the eagle's claws will be turned forward and not backward, as in the preceding three. Otherwise the new design will follow closely that of the present great seal, except that details will be treated more artistically, and the whole will be more beautifully executed, thanks to the progress of modern engraving. — *Boston Herald*.

## THE LAWYER'S PATRON SAINT.

BY JOHN DE MORGAN.

**I**T is a custom in England for the judge and members of the bar to attend the parish church on the Sunday prior to the opening of the Assize Court, and after the long vacation all the judges, benchers, and barristers attend church on a day set apart for a special service just before the opening of the Law Courts.

Every guild and old foundation society is supposed to have a patron saint, and it has often been asked what saint in the calendar the lawyers claim as their own.

An old legend, often retold by lawyers at public dinners of their fraternity, says that a famous Brittany lawyer once appealed to the Pope for the appointment of a saint. The Pope proposed that he should go round a certain church, blindfolded, and lay hold of the saint nearest to his hand. Following

the suggestion he stopped and grasped a certain figure, crying, "This be our patron saint!" When the bandage was removed from his eyes he found that though he had stopped before the shrine of St. Michael, to his horror he had laid hold, not of St. Michael, but of the figure under St. Michael's feet, which was a marble representation of the devil. "You have made your choice, my son," said the Pope, "and I do not see that I can interfere."

From that day to the present the devil has been looked upon, in jesting, as the patron of the lawyers.

About a century ago the "Legal Association" of London, consisting of both barristers and lawyers, established a volunteer corps for the defence of the country against invasion. When these legal volunteers were

reviewed by George III., in 1803, the King asked Erskine, who was in command of them, what was the constitution of the corps. "They are all lawyers," replied Erskine. "What! what! all lawyers, all lawyers?" exclaimed the King. "Yes, your majesty." "Call them the Devil's Own!" the King laughingly retorted, and from that day the corps has been known by that name.

Over one hundred of the corps volunteered to go to South Africa for service, and though enrolling themselves as members of "The Inns of Court Rifle Corps," they were generally referred to as the "Devil's Own."

The combative qualities of English lawyers have frequently been employed in defence of their country. A body of armed barristers was organized when Britain was threatened by the Spanish Armada. When the war between the Parliament and King broke out, a regiment of infantry was raised in the Inns of Court for the defence of Oxford, and a regiment of cavalry, described as being "well horsed and very fine," was raised to serve as a bodyguard to the King.

Among the numerous lawyers who played

a leading part in the struggle between the King and his Parliament were Whitelock and Ireton. Whitelock, replying to a speech made in the House of Commons in 1649 in favor of excluding lawyers from Parliament, said: "As to the sarcasms on lawyers for not fighting, I deem that the gown does neither abate a man's courage nor his wisdom, nor render him less capable of using his sword when the laws are silent, witness the great services performed by Lieutenant-General Jones and Commissary Ireton, and many other lawyers who, pulling off their gowns when the Parliament required it, have served stoutly and successfully as soldiers."

In our own country, when Abraham Lincoln issued his first call for volunteers, the lawyers were among the first to respond, and many of the volunteer officers, as well as privates, who distinguished themselves during that four years' war, were members of the legal fraternity. This same spirit was shown in the war with Spain, for among those deemed worthy of honor we find very many who, during the years of peace, carried the green bag.



# The Green Bag.

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor,  
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

*The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.*

WE are indebted to Bushrod C. Washington, Esq., for the following notes — hitherto unpublished — found among the papers of Mr. Justice Bushrod Washington, Associate Justice of the United States Supreme Court from 1798 until his death in 1829:

Upon the late organization of the District Court of this State [Virginia], old Mr. Ingersoll, a small man, President, and Benj. Morgan, a very large man, another Judge, Mr. Emery observed that though the Judges might be Judges of a District Court, they were not Judges of *a size*.

Mr. Burk [*sic*], anxious in the House of Commons to make a powerful attack on the ministry, had risen, when he found that another member, an everlasting speaker, had first caught the Speaker's eye, on which Burk with great reluctance sat down. The member who was up cleared the house of nearly all the members but himself and Burk. After he had spoken about three years [*sic*], he had occasion for illustration to refer to the riot acts, and requested that the Clerk would read them. Burk rose in a great hurry and inquired of the Speaker what the gentleman could mean, or why he should require the riot act to be read, "for do you not perceive, Mr. Speaker, *that they are dispersed already*."

A young minister was requested to preach the funeral sermon of Jonathan Pike. After saying a great deal in favor of his character, and as he was concluding, recollecting that there was another Jonathan Pike then living, he observed, "Take notice, my hearers, that I don't mean Jonathan Pike living on the road that passes by old Tim Dock's up there near the cow pasture — mind that now."

Judge Breckenridge whilst trying a man on some criminal charge called him a scoundrel. The man replied, "I am not as great a scoundrel as your honor — takes me to be." "Put your words closer together, sir," observed the Judge.

## NOTES.

A LADY inquired of Jekyl the distinction between an attorney and a solicitor. "Madam," replied the sarcastic wit, "exactly the same which exists between a *crocodile* and an *alligator*!"

IN the trial in the Federal court, at Des Moines, Iowa, of Letson Balliett, on the charge of using the mails to boom a worthless gold mine, one of the witnesses, who was a newspaper man of San Francisco, answered so glibly and quickly that he was several times cautioned by Judge Munger, on the bench, not to be so hasty.

In the course of the examination, Judge C. A. Bishop, the District Attorney, asked the witness by whom he was employed at present, to which question the witness replied: "The Scripps McRae Press Association."

"How's that?" said Bishop. "Don't say it so fast."

"Scripps McRae Press Association," glibly answered the witness again.

"Spell it, will you?" persisted Bishop.

"S-c-r-i-double p-s capital M - little c - capital R - little a-e - capital P - little r-e-double s - capital A-double s-period. Did you get that last?"

THE courts of Connecticut have had to deal with some complicated legal questions, but probably none has given them more difficulty than one which is presented by the arrest of a Meriden young man who unexpectedly kissed his *fiancée*. The indignant young woman has taken the case into the courts, and it is now "up to" the judges.

There ought to be some definite legislation upon this subject, but it does not appear to be covered, even by the Connecticut blue laws. In Colonial times a Boston man was fined for kissing his wife in public, but that is another matter. In this instance there was no third party. Cato degraded a senator by the name of Hanilius for kissing his wife in broad daylight and in the presence of his daughter, but Plutarch considered this punishment excessive, although Clement, one of the Fathers of the Church, exhorts all married people to refrain from kissing in the presence of third parties. In 1837, Mr. Thomas Saverland sued a lady who bit a piece out of his nose for having kissed her by way of a joke. She was a Miss Newton, and not his *fiancée*, but the defendant was acquitted. The Court laid down the *dictum* "when a man kisses a woman against her will she is fully entitled to bite his nose if she so pleases." This would seem to limit her remedy to retaliation at the time the offence is committed.

Deep-thinking Germany, however, may shed some light upon the problem. In a treatise published about a hundred years ago, a German jurist wrote upon the remedies that a woman has against a man who kisses her against her will. (*Von dem Rechte des Frauenzimmers gegen eine Mannperson die es wider seinen Willen küsset.*) In this learned treatise the distinction between lawful and unlawful kisses is made. Reducing the whole thing to a system he decides that a kiss between individuals of the same society is not a tort, and in actionable cases of what is, according to the Roman law, *crimen osculationis*, the punishment of the wrongdoer should be proportioned upon a sliding scale, being most severe in the case of nuns or married women, less severe between betrothed couples, and mild when the lady is neither married nor betrothed. Possibly this work might serve as a guide to the Connecticut bench in the present case. It might be well, however, to carry the case to the Supreme bench, in order that a betrothed suitor might know his exact legal rights, and his *fiancée* just what to expect. — *Boston Transcript*.

SENATOR DANIEL of Virginia was at one time counsel for a small Southern railroad. At a point on the line where it crossed a prominent highway they had an old negro watchman, whose

duties consisted in warning travelers of the approach of trains. One night a farmer's wagon was struck, causing a bad accident. The railroad company was of course sued for damages and at the trial the old darky was the chief witness for his employers. He answered the questions put to him in a clear, direct manner. Among them was the query as to whether he surely swung his lantern across the road when he saw the train coming, to which he replied:

"'Deed I did, sah."

The railroad company won the suit and Mr. Daniel took occasion later to compliment his witness on his excellent testimony. The old fellow was profuse in thanks, but before they parted bluntly said:

"'Lordy, Marse John, I sho' was skeered when dat lawyer gin to ax me 'bout de lantern. I was afeared he was goin' to ax me if it was lit or not, 'cause de oil in it done give out some time before de axdent." — *Exchange*.

AN interesting and unusual double divorce proceeding was recently made conspicuous in Wapelle County, Iowa, because the woman who was interested in both cases was exceedingly thankful to have a husband as an excuse for keeping her out of the penitentiary. On two pages of the court docket there appeared opposite each other two divorce proceedings in which a woman appeared,—in the one as plaintiff and in the other as defendant. Both were set for the same term of court, and to the inquirer there was at first some curiosity as to why the woman was not prosecuted for bigamy, but an investigation revealed the following story:

This woman had married, and her husband, after living with her a time, disappeared, not being seen or heard of for years. Believing that he was dead, she married again. Number one in the course of time put in an appearance, and being an unprincipled character, threatened to make trouble for the woman. In this manner he obtained hush money. Matters ran along until number two was made aware of the proceedings. Being enraged that his money had been going to support a prior husband, and claiming that he had not known that she was previously married, he filed a petition for a divorce. His action was foreseen by the wife, and she, wishing to hold him and hoping to cut

off his ground that she had another husband, began an action for a decree from number one, on the ground of desertion. It was a race for a divorce. Both came up about the same time. Number two secured his decree. She was granted separation from number one, but the decree was not signed. Having lost number two she had not pressed the matter.

She was soon thankful for a husband, for she, with still another married man, was prosecuted upon the charge of an offence which might open the doors of the penitentiary to them both. Fortunately, at the eleventh hour, she discovered that she still had a husband left, and setting up the argument that he alone could prosecute her on the charge preferred against her, she was discharged.

LORD HALSBURY, the succession to whose shoes is just now a topic of much interest in legal circles, is, says *To-Day*, as averse to tobacco in any form as Mr. Swinburne. When he was at the Bar, too, he was a great stickler for professional etiquette, and by these two traits hangs a tale. Montagu Williams, who was often his junior, was once at Shrewsbury with him in that capacity, and, according to custom, the counsel engaged in the case dined together. After dinner Williams brought out his cigar case, but to his dismay Giffard took peremptory objection to anyone smoking in the room, and, as by professional etiquette he was master of the situation, his junior had to forego his weed. But he got even with his leader. The future Chancellor made a point of never starting breakfast till his junior came down, but if he detested tobacco, Montagu Williams had no affection for breakfast, and the next morning the latter deferred his appearance till there was only time to get to court. When he got down he found Giffard in a fury, having punctiliously refrained from beginning breakfast. To his leader's reproaches the junior pleaded that he couldn't eat breakfast. "Why," retorted Giffard, "you're the most selfish fellow I ever came across." "No, no," said Williams, "you forget the smoking last night." Giffard at once gave in, and that night Williams smoked without demur.

SENATOR JAMES A. TREWIN of Cedar Rapids,

Iowa, has just finished a case, which has the record of being the longest ever tried in the Linn County district court, that came to him through a most peculiar and novel incident. The man who walks away from a hotel with the wrong hat is generally looked upon and thought of with anything but a genial disposition, but when about a year ago Horace Innman, the noted inventor, fitted Mr. Trewin's hat to his head and sauntered forth, he came back to prove a blessing to the worthy lawyer. The hat episode was the cause of an introduction and a warm acquaintance. The inventor explained that any man who had a head the size of his must be able to handle his matters, and he accordingly turned over to Mr. Trewin a case entitled the *Innman Manufacturing Company v. the American Cereal Company*, involving a question of compensation in the sum of about \$50,000 for machinery sold by the plaintiff to the defendant. The case was begun on May 26, and the jury was instructed June 30.

THE following amusing story is told of Timothy Coffin, who was for a long time judge of the New Bedford, Massachusetts, district. When a very young man he was retained in a case of sufficient importance to bring out almost every resident of the town; so that the little New Bedford court-house was packed when court was opened that morning. Coffin had been secured as counsel by the defendant.

Although it was his first attempt in open court, he had made little or no preparation, thinking that he could get through somehow or other when the time came. Thus, when the counsel for the defendant came into court that morning, he was greatly surprised and no less agitated to see the big crowd and realize the wide public interest in the trial at hand. He saw that he had looked upon the case too lightly. The prosecution was strong, and he had made not even a slight preparation. To lose the case meant a loss of a hoped-for reputation. Could he afford to commit this blunder by displaying his ignorance of the case? How could he get out of it? These were a few of the questions that are known to have flashed through the young lawyer's head, for afterward he himself told of the awful perplexity of the hour. Being a shrewd inventor, he devised a plan. As soon



as the court had been called to order and the crier had said his little say, he arose and asked for a postponement of the trial, on the ground that he had just received a telegram announcing the sudden and fatal illness of his mother, who resided at Nantucket.

Scarcely had the words of this appeal proceeded from the lips of young Coffin when an elderly woman quietly arose in the balcony of the court room and gave utterance to these words, "Timothy, Timothy, how many times have I chastised thee for lying!" Timothy recognized the sound of that voice only too well. It was that of his mother. This being Timothy's first public case, the old lady had secretly come up to New Bedford to see how well her son would do. Her presence of course was totally unknown to him. Timothy Coffin in after years made sure that his excuses would not be thrown back at him by any member of his family.

#### NEW LAW BOOKS.

SELECT PLEAS, STARRS, AND OTHER RECORDS FROM THE ROLLS OF THE EXCHEQUER OF THE JEWS. A.D. 1220-1284. Edited for the Selden Society by *J. M. Rigg*. London: Bernard Quaritch. 1902. (xi + 134 + 167 pp.)

This latest volume of the Selden Society, forming Volume XV. of its publications, contains, besides the selections from the rolls, an extremely interesting introduction, of some fifty pages, treating of the political, legal, economic and social condition of the Jews in England during the thirteenth century; such an accurate and vivid picture does this introduction give that we shall quote from it at some length.

"The origins of the English Jewry," says Mr. Rigg, "are wrapt in obscurity, and possibly date from a period considerably anterior to the Norman Conquest. That event, however, certainly caused a large influx of Jews from the Continent, who established themselves in force in London and Oxford during the reign of the Red King;" and in the early thirteenth century "there were probably few important towns in England where there was not a considerable and more or less wealthy Jewish community." By that time the Jews were "in the same category as treasure trove, a perquisite of the Crown." "Be it known," runs an early statute of Jewry—"part of the

so-called Laws of Edward,—"that all Jews, wheresoever they may be in the realm, are of right under the tutelage and protection of the King; nor is it lawful for any of them to subject himself to any wealthy person without the King's license. Jews and all their effects are the King's property; and if anyone withhold their money from them, let the King recover it as his own."

Still, the condition of the Jews was not altogether bad. "During the first period of their sojourn in England they seem to have enjoyed a comparative immunity from vexatious regulations. They were as yet compelled to wear no distinctive badge; nor was it until 1181 that they were disarmed. . . . They practised with some success as physicians, and plied the craft of the goldsmith. Probably other crafts were open to them. . . . On the other hand, the sphere of their trading operations was seriously restricted by the gilds merchant. They had not the full *jus commercii*; they could not go into the market and compete freely as vendors and purchasers. The readiest and most lucrative way in which they could employ their capital was, therefore, to lend it, and their operations received from a very early period the countenance and encouragement of the Crown. The privileges which they enjoyed were derived from a charter granted by Henry I. to a particular magnate, his family and dependents, which was confirmed to his posterity by Henry II. and Richard I. . . . and it was expressly extended to the entire community by John (10 April, 1201).

"By virtue of this patent the Jews were free to travel and settle where they would, and to receive and purchase whatever might be brought to them, except things pertaining to the Church, and blood-stained cloth, throughout the length and breadth of England and Normandy; were authorized to sell their '*vadia*,' or securities, after a year and a day's possession; were exempted from tolls and customs, including the wine duty, and from all jurisdiction except that of the King himself, or his castellans; were entitled to be tried by their peers, to be sworn on the Pentateuch, and to certain other privileges. The charter prescribed that in all cases between Christian and Jew, the plaintiff should produce two witnesses, a Christian and a Jew. This was fair enough, for it was doubtless as hard for

a Jew to obtain Christian evidence against a Christian as for a Christian to obtain Jewish evidence against a Jew. But the charter proceeded to discriminate: If a Jew were impleaded by a Christian who failed to produce testimony, he might purge himself by his bare oath on the Pentateuch, whereas in a similar case a Christian, as the law then stood, might be required to wage his law twelve-handed — *i. e.*, with eleven compurgators. Thus immensely more weight was attached to the oath of a Jew than to the oath of a Christian. Nor was this all. The charter gave to a writ in the hands of a Jew an evidential value which it did not accord to a writ in the hands of a Christian. The effect was to place the Jew at a great advantage over the Christian, both for attack and defence. The intention was to use the Jewry as a reservoir equally open to receive and close, to retain the surplus wealth of the surrounding population, so that the Crown might never lack a fund on which to draw in the hour of need. In an action on a loan a Jew had but to prove the advance, and the *onus* lay upon the debtor to dispute the interest. As to the rate of interest the charter is silent, but from an incidental statement in the *Dialogus de Scaccario* we gather that in the reign of Henry II. the ordinary rate was 2*d.* a week, or 43½ *per cent per annum*, which in the thirteenth century was recognized as the legal maximum, compound interest being strictly forbidden."

However, "it was not until 1275 that [a Jew] was legally capable of holding so much as a ten years' agricultural lease, and the license then granted was subject to the express reservation that he received no homage or fealty from Christians. It was only land tenable by rent in money or kind that he was entitled to hold at common law, and the '*mortua vadia*,' which are rarely and barely mentioned in the rolls, were probably rent charges.

"Though not technically a 'liberty,' the Jewry enjoyed a qualified autonomy in matters juridical. Within its borders the King's writ did not ordinarily run except in pleas of the Crown or between Christians and Jews. Cases in which Jews alone were concerned were as a rule left to the cognisance of their own tribunals. These privileges are recognised in a separate charter granted by John to the English Jewry con-

currently with the charter already mentioned, and were probably of no less ancient origin."

While the Jews were exempted from ordinary taxation, "their liability to contribute to the revenue individually, as occasion demanded and means permitted, was probably as old as their connection with the crown; but it was not until 1168 that they were subjected to collective tallage. Henry II. then demanded from them an aid of 5,000 marks, and as they owed their footing in the country and the greater part of their already vast wealth to the protection and privileges which the Crown guaranteed them, the impost was by no means exorbitant."

The coronation of Coeur-de-Lion, in 1189, was the occasion of an attack on the Jews, resulting in a massacre and general sack; this affair led to similar attacks in the provinces, culminating in a massacre at York, where the mob "broke into the cathedral and burned the bonds, which, according to the custom of the time, their victims had placed for security in the chapter-house." The destruction of the Jews was, in the eyes of the government, less serious than the loss of their bonds, of which the Crown possessed no duplicates.

For the purpose of securing the bonds of the Jews against destruction, "there were established in London and other principal towns of Jewry *Archae*, or, as we should now say, registries of bonds. Each *Archa* was administered by four chirographers, two of whom were Christians and two Jews, assisted by two copyists (*scriptores*) and clerks of the escheats. The chirographers were chosen by juries summoned by the sheriffs, and on election were sworn and required to find sureties for their trustworthiness. In their presence, in future, all contracts of loan between Christians and Jews were to be reduced into legal shape, and they were to retain an exact copy of each such contract under triple lock and seal. In practice, bond and memorial were written on the same skin, which, being folded on the blank space, was cut in an irregular line, so that the two parts corresponded as tallies. The original chirograph was sealed by the debtor and delivered to the creditor.

"Three rolls of receipt were also kept, one by the Christian, another by the Jewish chirographers, and a third by one of the clerks. A fourth roll, containing a record of every chiro-

graph and of all dealings therewith, was to be kept by the clerks of the escheats. The presence of a majority of the officials was to be essential to the validity of any transaction in any way affecting the rights of the parties, and the keys and seals were to be so distributed as that the muniment chest should be always in joint control. How far these minute and stringent regulations were actually observed it is impossible to say.

"The Jew's acquittances or assignments of loans were made out in the form to which he was accustomed in his dealings with his own people, and were termed *starrs*, from the Hebrew *shetar* (memorial or receipt). They were written sometimes in Hebrew with a Latin transcript, sometimes in Latin alone, occasionally in Latin in Hebrew characters, and occasionally in Norman French. They were signed by the creditor in Hebrew, and further authenticated by his seal. A starr of acquittance entitled the debtor to cancellation and delivery of the duplicate or 'foot' (*pes*) of the chirograph, but was not valid unless enrolled in the Exchequer. It is probable that this was not the original rule, but it was already established in the middle of the thirteenth century; and hence transcript of these documents appear with frequency upon the Plea Rolls. It only remains to add that the debtor was answerable to the Crown upon an unregistered chirograph or a chirograph privily acquitted, and that, though executed with all due formalities, both chirograph and starr remained impeachable for fraud, which, however, was hardly possible without collusion or culpable negligence on the part of the officials.

"By this admirably contrived system the creditor was placed entirely at the mercy of the Crown. Henceforth, whenever the Barons were more than ordinarily hard-fisted, the King had but to order a general scrutiny of the *Archae*, and having thus ascertained the financial position of his chattels, could proceed to talliage them with scientific precision, and, if they proved refractory, attach their bonds and persons until his demands were satisfied. During the scrutiny the register was closed under triple lock and seal,

and all business was suspended. The organization within the Court of Exchequer of a separate tribunal for the trial of Jewish causes was the natural sequel to the establishment of the *Archae*. The connection, indeed, of the Jews with the Court of the Exchequer was probably as old as the Court itself; for as chattels of the King, holding all that they possessed at his bare good will and pleasure, they were in a permanent condition of indebtedness to the Crown, and were therefore in all civil cases properly impleaded in the forum of account; but of the specific *Scaccarium Judeorum* or *Judaismi*, Exchequer of the Jews or Jewry, as it came to be called, records there are none before 1218, nor any trace of its existence until the last year of Richard I. We then (1198) encounter for '*Custodes Judeorum*,' 'Wardens of the Jews,' who are associated with the Barons of the Exchequer, and are in fact Barons in all but the name."

The question of jurisdiction was a frequent bone of contention between the Justices in Eyre and the Justices of the Jews, the latter claiming exclusive jurisdiction and the former refusing to recognise this claim. However, "the Justices of the Jews were at all times subordinate to the Treasurer and Barons of the Exchequer, who corrected their 'excesses', and with whom in cases of exceptional difficulty they were accustomed to confer. . . . In short, the Exchequer of the Jews, though it had its own seal and separate staff of officers, was not so much a separate Court as a branch of the Great Exchequer, invested with a jurisdiction never very precisely defined, and which never became, though it gradually tended to become, exclusive of that of the King's Court." It is significant, however, that the court fees for Jews were higher than those charged to Christians.

Want of space forbids quoting at greater length from Mr. Riggs' interesting study; but the above extracts indicate vividly the position of the Jews under the Plantagenets, and — what is of especial interest to the student of the law — show some, at least, of the effects of these conditions on the legal system of England.







*A. Brown*

# The Green Bag.

VOL. XIV. No. 10.

BOSTON.

OCTOBER, 1902.

## AARON BURR AS A LAWYER.

BY EUGENE L. DIDIER.

A GALLANT soldier in the American Revolution — a brilliant lawyer — a distinguished statesman — a polished gentleman, such was Aaron Burr. For his honorable services, he deserved well of his country; he has received obloquy and insult; and for a century a dark cloud has obscured the bright fame of this once popular hero and statesman.

Other hands will lift the pall that has so long darkened the fair name of this most interesting and picturesque figure in American history. Other pens will tell the story of his heroism as a soldier, of his services as a senator, and as Vice-President of the United States,—I purpose to write of Aaron Burr as a lawyer.

After an unusually brilliant collegiate course, he graduated at the College of New Jersey (now Princeton University), at the age of sixteen. Always a great reader, he continued his studies after graduation, and was in no haste to choose a profession. Even at this early period he had deliberately rejected the religious creed of his ancestors and become a follower of the gospel according to Lord Chesterfield: Honor was his god, and Chesterfield was his prophet. The courtesy, the refinement, the self-possession, the high sense of worldly honor, which distinguished Aaron Burr through life and in death, was derived from the study of the celebrated *Letters* of Philip Dormer Stanhope, Earl of Chesterfield.

In his eighteenth year, Burr decided to adopt the profession of the law, and commenced the study in the office of his brother-in-law, Tappan Reeve. He was thus engaged when the news of Lexington reached him. His law books were thrown aside, and the ardent young patriot was soon on his way to the camp of Washington, near Cambridge, Massachusetts. During the next four years he was actively employed in the War of the Revolution, having no time for reading or study. In 1779, his health being impaired by his constant and laborious services in the army, he resigned his Lieutenant-Colonel's commission, and, after spending eighteen months in recruiting his health, resumed the study of the law. With his usual enthusiasm, he read from sixteen to twenty hours a day. At the end of six months he applied for admission to the bar at Albany, New York, and, after triumphantly passing a long and severe examination, was admitted on the nineteenth of January, 1782. He opened an office in Albany. His large acquaintance among prominent men, his fame as a soldier, his distinguished ancestors, his devotion to business, and his fascinating manners, all combined to make his advance at the bar rapid and brilliant. Three months after opening an office, he had secured so lucrative a practice that he felt able to be married. The lady of his choice was a widow, Theodosia Prevost, ten years older than himself, with two sons by her former

marriage. She was not beautiful, but accomplished, refined, intelligent, and in style and manners without a peer among the women of her time. There was a congeniality of mind as well as of heart between husband and wife which made their married life one of ideal beauty. Within a year of their marriage, their only child was born, the beautiful, the beloved, the brilliant Theodosia, who lived to love her father as few fathers have ever been loved, and whose tragic death was a blow which staggered even his rare fortitude. The following passage from one of her letters to him shows with what enthusiastic admiration she regarded him:

"I witness your extraordinary fortitude with new wonder at every misfortune. Often, when reflecting on this subject, you appear to me so superior, so elevated above other men, I contemplate you with such a strange mixture of humility, admiration, reverence, love and pride, that very little superstition would be necessary to make me worship you as a superior being; such enthusiasm does your character excite in me. When I afterwards refer to myself, how insignificant do my best qualities appear. My vanity would be greater, if I had not been placed so near you; and yet my pride is our relationship. I had rather not live than not be the daughter of such a man."

After practicing law with great success in Albany for eight months, Burr removed to New York on the twenty-fifth of November, 1783, soon after the British evacuated that city, at that time a place of twenty-five thousand inhabitants. In this larger field he soon made himself felt as a lawyer prepared to take his place among the leaders of the bar. With the exception of serving two sessions in the State Legislature (1784-5), his profession took up his entire time during the next eight years.

Aaron Burr was not a great lawyer in the same sense that Marshall, Taney, Luther Martin, Pinkney, Webster, and Charles O'Connor were great. But as a lawyer who possessed all the legal weapons of offense and defence, and could use them with skill and daring, his equal has never lived. He was indefatigable in preparing his causes, examining evidence, and employing every expedient. He was never surprised by his adversary, but often took his adversary by surprise; no adversary ever found him tripping, but he often tripped his adversary. He was regarded as a martinet in the profession; he asked no favors, and granted none. Matthew L. Davis, who knew Burr long and intimately, said he would no more have solicited indulgence from an opponent in his professional practice than from an armed foe; but, at the same time, he rarely withheld any courtesy that was asked of him, not inconsistent with the interest of his client; like a gallant knight he struck rapid blows when engaged in legal combats. He was a strict practitioner; and was so fond of legal technicalities that he never omitted an opportunity of trying his own skill with that of the opposing counsel, in submitting pleas, demurrers, etc.

He did not pretend to be an orator. He never declaimed; his arguments were delivered in a quiet, calm, deliberate manner. He was never diffuse, but always to the point; sometimes sarcastic, but never domineering; his address was unrivalled, his manner courtly, his bearing cool and dignified. He never undertook a case which he did not feel sure of winning, and never lost a cause which he personally conducted. His style of speaking has been described as unique, as peculiarly his own; he was always brief; never loud, vehement or impassioned; but conciliating, persuasive and impressive; stern and peremptory, when the subject

called for gravity or seriousness. He was too dignified ever to be a trifler. His enunciation was slow, distinct, emphatic. He spoke with great apparent ease, but could not be called fluent, although he never appeared to be at a loss for words, which were always so choice and appropriate that they seemed to have been carefully selected; but they fell from his lips as if they had been written down in a prepared speech and committed to memory. He never appeared hurried or confused, or betrayed the slightest embarrassment for the want of ideas to support his argument, or language in which to clothe it. He possessed a memory so well disciplined as never to forget anything in the excitement of the legal forum which in the retirement of his study he intended to use. He said he never spoke with pleasure to himself, or even self-satisfaction, and seemed unconscious of the effect which he produced upon the minds of his hearers. A contemporaneous lawyer said: "Colonel Burr pursued the opposite party with notices, motions, applications, bills, and re-arguments, never despairing himself, nor allowing to his adversary confidence, nor comfort, nor repose. Always vigilant and always urgent until a proposition for compromise or a negotiation between the parties ensued. 'Now, move slowly,' he would say; 'never negotiate in a hurry.' I remember a remark he made on this subject which appeared to be original and wise: There is a saying, 'never put off until to-morrow what you can do to-day.' 'That's a maxim,' he said, 'for sluggards; the better reading of the maxim is never do to-day what you can do as well to-morrow; because something may occur to make you regret your premature action.'"

In every case of importance tried at the bar of New York, from 1784 to 1800, Aaron Burr and Alexander Hamilton were either

on the same side or on opposite sides. General Erastus Root, who knew Burr well and served with him in the New York Legislature and in Congress, and often heard Burr and Hamilton speak in court said: "As a lawyer and as a scholar, Burr was not inferior to Hamilton, and his reasoning powers were at least equal. Their modes of argument were very different. Hamilton was very diffuse and wordy. His words were so well chosen, his sentences so faultlessly formed into a swelling current, that the hearer would be captivated. The listener would admire if he was not convinced. Burr's arguments were generally methodized and compact. I used to say of them when they were rivals at the bar that Burr would say as much in an half hour as Hamilton would in two hours. Burr was terse and convincing, while Hamilton was flowing and rapturous. They were much the greatest men in this State, and perhaps in the United States."

In a twenty-minute speech, Burr often completely demolished Hamilton's most elaborate arguments. Until he was elected Vice-President of the United States, Burr had no superior either at the bar of the State of New York, or in the United States. Said a lawyer of the time: "No lawyer ever appeared before our tribunals with his case better prepared for trial, his facts and legal points being marshalled for combat with all the regularity and precision of a consummate military tactician. No professional adversary has ever boasted of having broken, or thrown into confusion the solid columns in which he had formed them, or having found spaces in their lengthening line, or having beaten him by a *ruse de guerre*. He never heeded expense in completing his preparations for trial; and while laborious himself, he did not stint the labors of others, so far as he could command or procure them. Every plea or necessary



paper connected with his causes was in the first place multiplied into numerous copies, and then abstracted or condensed into the smallest possible limits, but no material point or idea was by any means to be omitted. His propensity to condensation was a peculiar trait in his mind. He would reduce an elaborate argument extending over many sheets of paper to a single page."

Aaron Burr came to the bar at a very favorable time; the courts were crowded with business; almost every principle of law had to be settled, and most of the former leaders of the New York bar were excluded from practice in the courts because they had adhered to the Tory side in the Revolution. Up to this time no case had been reported in the thirteen States, consequently there were no written decisions to cite, no precedents to follow; no rules to guide the court and counsel. Every legal point bearing upon each individual case had to be argued every time. Burr's memory, which was wax to receive and marble to retain, gave him an immense advantage in the practice of the law. As already mentioned, he enjoyed a large and lucrative business, estimated at ten thousand dollars a year, which was a very handsome income in those days. His remarkable success at the bar was not the result of flowery declamation, impassioned eloquence, or the rhetorical beauty of his language. He used plain, solid, concrete language, depending for success upon a clear presentation of the strong points in his causes. Burr's style as a speaker was like that of Sallust as a historian: his sentences were terse, his language choice, but plain, so that every person could understand him. Hamilton was more like Cicero: his language was full, flowing, ornamental and impassioned.

It was said that Hamilton's eloquence induced a great elevation or depression of the

mind, consequently could be easily followed by the note-taker. Burr's was more persuasive and imaginative. He first enslaved the heart, and then led captive the head. Hamilton addressed himself to the head only. Yet Burr was very concise in his language; every word was in its proper place and seemed to be the only one suited to the place. He made few or no repetitions; if what he said had been immediately sent to the printer, it would have wanted no correction.

Burr's definition of the law—"whatever is boldly asserted, and plausibly maintained,"—was pointed, if not true. He lived up to this cynical maxim in his own practice of the law, and was the most successful lawyer of his time.

Aaron Burr never displayed so much legal knowledge and talent, so much energy and activity, as during his trial for treason, at Richmond, Virginia, in 1807. Some of the greatest lawyers in the United States were engaged in that trial,—Luther Martin, William Wirt, George Hay, Alexander M'Crae, Edmund Randolph and John Wickham. In this group of legal giants, Burr was the real leader of the defence. He was consulted before any step was taken; not a motion was made, not a point yielded without consulting him. As usual, his manner was calm, dignified, polite, impressive. The voluminous report of this celebrated trial shows with what transcendent ability he displayed day after day, and hour after hour, through that long, bitter, vindictive prosecution, in which all the power, resources and influence of the President of the United States were employed to hound one man to death. This same record shows no less clearly the man's rare fortitude, remarkable courage, and exquisite patience.

Jefferson, having committed himself to the declaration that Burr was guilty of treason,

thought himself bound to prove the charge; the President had alarmed the country with the cry of "wolf!" and in order to escape being laughed at felt bound to make good his accusation. For this purpose he left no stone unturned,—for this purpose he summoned witnesses, and threatened them with the strong arm of the government,—for this purpose he vilified Burr,—for this purpose he employed the brilliant talents of William Wirt; in a word, Thomas Jefferson appears in the despicable light of a persecutor, using all the influence at his command to convict of a capital crime the man whose extraordinary exertions and splendid political management had placed him in the exalted position which gave him that influence. The world had not witnessed such hideous ingratitude since Francis Bacon prosecuted unto death his friend and benefactor, the young, brave, gifted, noble, generous, and accomplished Earl of Essex.

Not satisfied with attempting to influence witnesses and to force them by threats to testify against the accused, Jefferson wished to deprive Burr of the services of his principal advocate, and asked Hay, the United States District Attorney, whether "we shall move to commit Luther Martin [whom he styled "an impudent Federal bull-dog"] as *particeps criminis* with Burr." The conduct of Jefferson in this whole matter has been pronounced "a monstrous proceeding—a proceeding without precedent in the history of criminal prosecutions." Andrew Jackson denounced Jefferson's conduct towards Burr as a "persecution," and it caused Luther Martin to declare that "Jefferson hated Burr with a bloodhound's keen and savage thirst for blood." He had attempted to prejudice the case against Burr by declaring in advance that "of his guilt, there can be no doubt." He had proclaimed the man a traitor who had risked his life for years in

the cause of his country's liberty, while Jefferson remained at home, safe and secure. To the attempt of the prosecution to withhold certain important papers necessary to Burr's defence, Martin vehemently declared that "whoever withholds, wilfully, information that would save the life of a person charged with a capital offence, is substantially a murderer, and is so regarded in the registry of heaven."

Burr was always at home in a court of justice: there, no man was his superior, few his equal. He listened patiently while the prosecution introduced witness after witness in evidence of his alleged overt act, but, on the seventeenth day of the trial, when the prosecution was about to introduce indirect and collateral evidence, the accused thought it was about time to stop the introduction of any more testimony unless it was to prove the overt act. Upon this point the great battle of the legal giants was fought to the finish. During this argument, which lasted nine days, there was "the finest display of legal knowledge and ability of which the history of the American bar can boast." It all turned upon the question whether, "until the *fact* of a crime is proved anything may be heard respecting the guilty *intention* of the person accused." In this great debate, while Wickham, Martin, Randolph and Hay all distinguished themselves by their arguments on the legal question involved, William Wirt addressed himself to a sentimental view of the question, and in the course of his flowery and impassioned oration, which is as full of fiction as any romance ever invented by the wit of man, he drew a fancy sketch of the relationship which had existed between Burr and Blennerhassett. Yet, that fairy-story has done more harm to the name and fame of Aaron Burr than anything and everything else besides. Chief Justice Marshall, who presided over this celebrated trial

with a dignity, ability and impartiality which added a new distinction to his illustrious name, rendered an elaborate opinion on the motion before the court, deciding that no collateral or indirect evidence could be offered before "the overt act" was proved, "because," said the Chief Justice, "such testimony, being in its nature merely corroborative, and incompetent to prove the overt act in itself, is irrelevant until there be proof of the overt act by two witnesses."

The case was submitted to the jury, who retired, and in a few minutes they returned with a verdict of "not guilty." Aaron Burr was acquitted of the crime of treason, but he left the court room a ruined man, bankrupt in fame, fortune and friends. With two indictments of murder pending,—one in New York, the other in New Jersey; with his occupation as a lawyer gone; with his beautiful estate, Richmond Hill, in New York, sold for debt at much less than its real value; with the administration newspapers denouncing him without mercy, and the opposition giving him but a lukewarm support, he was driven from his home and country with the mark of Cain upon his brow.

After an exile of four years, Burr returned to the United States in 1812, landing in Boston, where he remained *incognito* ten days or two weeks, waiting word from his devoted friend, Swartwout, as to whether it would be safe for him to go to New York. Finding that he could return without danger of molestation, he went to New York, and after remaining concealed about a month, he announced through the press that "Aaron Burr had returned to the city and had resumed the practice of the law at 23 Nassau street." The announcement thrilled the city, and before Burr retired that night five hundred gentlemen called upon him. The first feeling in New York was that he had

been treated with unjust severity, and there seemed to be an intention to bury the past. His capital was ten dollars, his office was in the home of a lady who had been his friend through all his troubles. A small tin sign bearing his name was nailed up in front of his house, and within two weeks after the announcement of his return had been made, he received in fees two thousand dollars.

Judge John Greenwood, who was a clerk and student in Burr's office for six years, (1814-1820), in his interesting reminiscences speaks of Burr's manner in court: "He was somewhat reserved, although never submissive; he used no unnecessary words, but would present at once the main point of his case, and as his preparation was thorough, he was usually successful. If he thought his dignity assailed in any way, his rebuke was withering in the cutting sarcasm of the few biting words, and the lightning glance of his terrible eyes which few could withstand. I may say in this connection, that his self-possession under the most trying circumstances was wonderful, and he probably never knew what it was to fear a human being. His manners were cordial and his carriage graceful, and he had a winning smile in moments of pleasant intercourse which seemed almost to charm you. His heart was not in the profession of the law, but he was, however, a good lawyer, and well versed in civil, common and international law; acquainted generally with the reports of adjudicated cases, and in preparing important cases, usually traced up the law to its ancient sources."

One of the most important cases that he conducted after his return from Europe, was a suit in chancery, the celebrated "Medcef Eden case." An outline of this remarkable case will show Burr's cleverness as a lawyer in a suit which was deemed absolutely hopeless. Medcef Eden was a wealthy New

York brewer who died in 1798, leaving his two sons a large amount of real estate on the island of Manhattan. By the terms of his will, the sons were to share the property equally, and if either died childless, the survivor was to inherit the share of the deceased. By their extravagance, and the dishonesty of certain creditors, the young men ran through their fortune in three or four years, and were reduced to great poverty. The case was submitted to the two leading lawyers of New York, Aaron Burr and Alexander Hamilton, as to whether the estate could be recovered. Hamilton decided in the negative; Burr said it could. The former opinion was adopted, and the matter rested on that decision until after Burr's return from Europe, when his attention was called to the case by the death of one of the brothers. During the intervening years the property had greatly increased in value, and Burr thought it was worth an effort to try to recover it. He sought out the surviving brother, and having induced him to agree to follow his advice in all things, he undertook the case with his usual energy. The most valuable part of the property was in the city, held by banks and other wealthy corporations. These he let alone, but devoted his efforts to recover a small farm in the upper part of the Island, his object being to establish the principle first, and then to proceed against the other property. He won this first suit both in the lower court and in the Supreme Court of the State. Then he went for the holders of the city lots, plying them with a sudden storm of writs of ejectments, winning suit after suit, and succeeded in recovering a large amount for his client and himself.

Burr had, at different times, many young men in his office as clerks and students. One of these describes the manner in which he passed the day: "He rose at five. A

breakfast of an egg and cup of coffee sufficed for this most abstemious of men; after which he worked among his papers for some hours before his clerks and assistants arrived at the office. All day he was dispatching and receiving messages, sending for books, persons and papers, expecting everything to be done with next-to-impossible celerity, inspiring everyone with his own zeal, and getting a surprising quantity of work accomplished. He was business incarnate. About ten p. m. he would give over, and invite his companions to the sideboard, and take a single glass of wine. Then his spirits would rise, and he would sit for hours telling stories of his past life, and drawing brief and graphic sketches of celebrated characters with whom he had acted. About midnight, or later, he would lie down upon a hard couch in a corner of his office, and sleep like a child until morning. In his personal habits he was like a Spartan,—eating little, drinking little, sleeping little, working hard. He was fond of calculating upon how small an amount life could be supported, and used to think that he could live well enough on seventy-five cents a week."

On one occasion, soon after Burr began the practice of the law in New York, he and Hamilton were engaged on the same side in an important case. The etiquette of the bar assigns the closing argument to the leader of the case, but it was not decided who was the leader in this particular case. Hamilton, who had a very good opinion of himself, hinted that Colonel Burr should open the case. With that exquisite politeness habitual to him, Burr assented to the arrangement without the slightest opposition. He determined, however, to give Hamilton a lesson. Having repeatedly talked over the case together, Burr knew every point Hamilton would make in his

argument, and when he came to address the jury, he not only used all his own arguments, but anticipated all of Hamilton's. In fact he exhausted the case, and left nothing for Hamilton to advance. Consequently he carried off all the honors. Hamilton never afterwards showed an undue desire to take the place of honor in any suit in which he was jointly engaged with Colonel Burr.

Few men had more to forgive and more to forget than Aaron Burr; and few men had more of the gentle grace of charity than this man who had suffered from the treachery of friends, the malice of his enemies, and the thoughtless injustice of the mean and ignorant. Although he believed to his dying day that General Wilkinson had deliberately betrayed him in the Mexican scheme, and he despised him heartily, he never denounced him; although Jefferson had wielded all the power of the federal government to convict him of treason, Burr never seemed embittered against him. He described him as a man of great information, and very agreeable in conversation; but, of no "presence," a plain man who carried his democratic principles to the verge of Jacobinism.

During the last thirty-five years of his life, Burr received many private affronts which he bore with surprising patience. Sometimes, however, he would resent a public insult in a way that was never forgotten by the witnesses, or forgiven by the victim. Once, in his old age, he was attending court at Jamaica, on Long Island, when a young lawyer attempted to win the applause of the court room by abusing Colonel Burr in his opening speech. Burr listened patiently to the tirade of the young blackguard who was about fifty years his junior, and rising to reply, said in his blandest manner, and without a sign of irritation in his voice:

"I learned in the Revolution, in the society of gentlemen, and have since observed for myself, that a man who is guilty of intentional bad manners, is capable of crime."

This quiet remark completely quelled the insolent young lawyer, and was received with approving smiles by the crowd of spectators.

On another occasion, a lawyer whose standing must have been rather doubtful, declined to appear in a case on the same side with Aaron Burr. The client decided to let the squeamish lawyer go, and to confide the case entirely to Colonel Burr. It was well known that he never undertook a case which he was not sure of winning, and that he had never lost a case which he had personally conducted. The opposite side waited to hear whether he had accepted the case, and when they heard he had, immediately offered to compromise.

The game old man continued the practice of law in the New York courts until he was nearly eighty years old. One morning, at the close of the year 1833, as he was walking along Broadway, he was stricken with paralysis. He recovered from the stroke with astonishing rapidity, and was soon at work again, determined to be the man of business, the great lawyer to the last. In a few months he suffered another stroke which deprived him of the use of his limbs. Even then he would not give up, but, reclining on a sofa in his office, he received his clients and wrote opinions, and dictated letters day after day. But, as the months went on, he was obliged to relinquish all business pursuits and accept his changed condition.

In his helpless state, he was made comfortable by the devoted attention of a lady, who, with the concurrence of her husband, invited him to her house, and placed at his disposal two basement rooms, where, surrounded by his own books, pictures and

furniture, he passed all but the last few months of his life, having every want supplied. Opposite to his couch hung the portrait of his daughter Theodosia; and for hours at a time he would silently gaze upon the face of his beloved child, whose tragic death he said, "had severed him from the human race."

Early in the summer of 1836 he was re-

moved to Staten Island, where he was so much benefited by the sea air that the indomitable old hero actually dreamed of returning to the city and resuming his law business. But this was only the last glimmer of the dying lamp; and as the summer wore on he grew weaker day by day, until on the fourteenth of September, 1836, he passed away.

### A NOVEL CONTRACT.

THE man was lanky and ungainly, and the woman rather pretty, though evidently an empty headed, silly little thing. They appeared together at the lawyer's office desiring to have him attest the legality of a document which the man had prepared at the cost of infinite labor and patience.

In response to the lawyer's questions they divulged the fact that the wife had eloped a month before with another man, and a goodly share of the household effects, and on her return the forgiving husband desired some proof from her that her penitence was sincere, and at the same time some protection for the future. The following is the document presented:

H . . . . . dec 17th 98.

this Contract is to Certfie agreement Between the said Parties the first Parties B. W. Jones an the secont Partey Marthe G. Jones of the city of h . . . . ., do agree to Bury the truabel that Hapend On the 14 day Of Dec. 1898. the secont Partey Marthe G. Jones on that day lift Home an Childern an Went to Rochesty to Work for Alburt Hoge

an On the 17 day of dec, Returned Home to h . . . to the first Party B. W. Jones. an the Buth Parties agree to Hear By agree to the folowing agreement that they Will the first time theat Eny thing acurs Between the Parties, an Eather Party, B.W. Jones or M. G. Jones disides to Part ther Home, they shall Just take the Close they Have in the House Hold, and leve all the House Hold goods and the 3 Childern, Tomy J., Merty R. an L. S. Jones With the Party that is lift Behind. He shall Have full Charge Of all the goods in the House an the three Childern Hear By menchund a Bove. An Both agree to Hear after be as Hasbun an Wife should, By Eachother, an Eather Partey fails to full fill this agreeament the Other Partey is to Have full Controll Of all that is spefied in thaes ritins, an the Partey that goes Back On the agreeament is to lose all titill in goods Or Childring, an the party that stands to the Paprs shall for efer Controll all hear By spefied.

B. W. JONES.

MARTHE G. JONES.

## THE CONTROL OF "TRUSTS."

By HARRY EARL MONTGOMERY.

THE discussion of the "trust" problem has passed through the hysterical, demagogical and denunciatory period, and has now entered upon that stage where calm, sane and deliberate judgment prevails. The thoughtful minds of the country have come to agree on certain phases of this question, among which may be cited the following:—

First: That the giant corporation, mis-called a "trust," is a step in the natural, logical and evolutionary development of the co-operative idea in the economic world.

Second: That there are many good features as well as many bad features connected with "trusts," in the way they are organized and conducted.

Third: That "trusts" are becoming more numerous, year by year, and that they now are, and will continue to be, live, controlling factors in the commercial life of our nation.

Fourth: That to take away the charters of the corporations commonly known as "trusts" would be unfair and unjust to their stockholders, and would be productive of great loss and injury to the whole people.

Fifth: That it is imperative that some means be found at once to regulate and control the "trusts" so as to preserve their good features, and at the same time to destroy their power to harm.

Sixth: That it is the duty of the State Legislatures to take hold of this problem, and to pass laws tending to its solution, until such time as power shall be vested in Congress to enact a general corporation law applying to all corporations throughout our land.

A "trust," in the common acceptation of the term as applied to industrial combinations, is a corporation having a large aggre-

gation of capital. A corporation is a privilege granted by a government to a few citizens permitting them to co-operate and carry on a joint enterprise without partnership restrictions and liabilities. A corporate charter is sought because it enables its owners to exercise certain functions impossible to individuals and to partnerships. Being a privilege highly prized, it ought not to be given without adequate compensation. This principle is the basis of the theory upon which our government was reared.

A corporate privilege is worth to its owners just what it will earn, and no more and no less. If a corporation does business at a loss, or comes out even, the privilege of being incorporated is worth practically nothing. If this privilege is the means whereby money is made, then the privilege is worth something. If the earning power of this privilege is greater than is the earning power of individual dealers, or of partnerships, then it is unfair and unjust to the many to permit the few, through the gift of the State, to outstrip them in the race for wealth. And if the possession of this corporate privilege gives to the few owners the opportunity to make money at the expense of the many, as so many corporations are doing to-day, the State should step in, and, so far as possible, equalize the rights of all. This the State can do in but one way,—by means of its power of taxation.

That the State has a right to levy a tax as a payment for the giving of a corporate charter, the courts have repeatedly held. But how to lay this tax? Shall it be on corporate assets, on capital stock, on dividends, on the volume of business, or on profits? Experience has shown that the

rule laid down in the case of *The People vs. The Home Insurance Company*, 92 New York Court of Appeals 341, is the only one that is both just and equitable. The Court said: "It can hardly be denied that the fair measure of the value of the franchises of corporations would be the profits resulting from their use, and in adopting such a rule of estimate no one could justly complain of its being unequal in its effects upon different corporations, or unjust in its general operation."

No distinction should be made between corporations in the matter of their taxation, except, perhaps, in the cases of banking and insurance companies and charitable associations whose functions are entirely different from those of business and industrial corporations. Such a tax may be levied in the manner following:—

In the first place, there should be established a Corporation Department, to incorporate associations and to have charge over, and the control of, all corporations chartered by the State or doing business in the State. The head of this department should be appointed by the Governor, to hold office during the term for which the Governor is elected. For so important an office as this, great care should be taken that an able, honest and unapproachable man be selected. If the office was elective, favoritism or corruption in the official would be punished by the election of a new man. No political party or officeholder would necessarily be blamed for the official's downfall. If, however, the office was appointive, not only the appointee, but the Governor and his party would be held responsible, and thus a better man would more likely be obtained.

The incorporation tax should be abolished, so as to encourage the formation of corporations; for it is to corporations with their large aggregation of capital that we must

look for the development of our country. Without corporations, our manufacturers could not compete with the corporations of England, of France, and of Germany, in the race for the Asiatic and South American markets.

To extend our markets, and thereby provide an outlet for our surplus productions, is the crying necessity of our economic life. Unless we do obtain a foreign market in which to dispose of our goods, the grim form of the black panic will soon raise its head in our land. And to obtain these markets giant corporations must be met and conquered by more powerful and far greater aggregations of capital, organized in the form of corporations.

The real and personal property owned by corporations should be locally assessed and taxed in the civic divisions in which the property is located, the same as the real and personal property owned by individuals. The reason is twofold. The local authorities have a better knowledge of the value of property situated in their locality, better facilities for obtaining this knowledge, and therefore would make fewer mistakes than would a board of examiners composed of residents from different parts of the State; the cities and counties depend largely for their support upon the taxes levied upon the property of corporations located within their jurisdiction, and to withdraw this revenue would cause confusion and would increase the burdens of the local taxpayer.

If such taxes were abolished, corporations would be organized to hold real and personal property for individuals, thus depriving the government of a large part of its revenue.

Every prospectus or advertisement issued or published with a view of obtaining subscriptions for shares or for bonds of a corporation, organized or to be organized, should give full details as to its organization; the



contracts into which the promoters or organizers have entered ; the consideration paid for property purchased or acquired ; the amount of money to be used for preliminary expenses ; the amount to be reserved for working capital, and all information necessary for safe and intelligent investment. For a false statement, or for issuing a prospectus which does not make a full disclosure of the corporate affairs, the promoters and their associates, the officers and their agents, should be held legally responsible and be subject to a fine or imprisonment.

The head of the Corporation Department, through his staff of examiners, annually should examine the affairs of all corporations organized in the State, inspecting their books, agreements, receipts, expenditures, vouchers, records of meetings of directors and stockholders, and report the condition of their affairs as of the first of January of each year. Power should be given him to compel the attendance of witnesses to be examined under oath. And if it should be found that the corporation was over-capitalized or was violating any of the laws of the State, or of the United States, the Corporation Department, after giving a thirty days' written notice to rectify the wrong, should place the evidence in the hands of the Attorney General, who should immediately begin an action to annul its charter.

All foreign corporations doing business within the State should be annually examined by the head of this department to ascertain the amount of business done in the State and to determine whether the corporation was obeying the laws.

A detailed report of the examination of the property, business, profits and losses of every corporation should be made each year and kept on file in the office of the department. A summary statement of its assets and liabilities, the amount of stock issued and

the amount paid thereon, in cash and otherwise, the actual amount of surplus and the nature and mode in which it has been used and invested, should be published in the State paper and also in one newspaper published in the county where the principal place of business of such corporation is located. Such notice would furnish sufficient data for safe and intelligent investment. By means of a State Board of Examiners the affairs of each corporation would become known, and the purchaser of bonds and stocks could rely upon the Board to see that the corporations were not over-capitalized and that they were doing business honestly and fairly and within the provisions of law. In this way, the corporation, the purchaser of corporate bonds and stocks, and the general public would be protected. The State, which gives to a group of citizens a charter of incorporation, a special privilege, an advantage they did not possess as individuals, has the right to know that the privilege is not being used unfairly or illegally. If a corporation is legally organized and is conducting a legitimate business, no injury will be done it by inspection.

Every corporation is rated according to the profits made. The corporate charter is valued exclusively by the prosperity of the corporation. A tax upon the profits would be governed by actual results and be equal in its effect upon the different corporations and be just in its general operation. Whether or not a corporation has a special privilege in the nature of a monopoly given by a patent, by the tariff, or by the control of the market, would make no difference in the laying of the tax. If a corporation possessed any of these privileges, it would be obliged to pay for them, and to pay for them in proportion to their value, as evidenced by their earning power.

A corporation should be permitted to earn a reasonable profit on its assets. If this per-

mission were taken away, all incentive to doing business would be killed, the affairs of corporations would be wound up, and the State would be compelled to face the condition of having ninety *per cent.* of its factories closed, thousands of workingmen thrown out of employment, and its people made dependent upon other States for the necessities and the luxuries of life. That the percentage of profits allowed should be liberal no one will question. While four *per cent.* may be the average value of capital, we would suggest the allowance of six *per cent.* of actual net profits on the fair market value of the tangible assets of the corporation, as this percentage would be large enough to stimulate business and not so large as to work injustice between corporations and individual dealers. We do not mean the allowance of six *per cent.* only from the date of the enactment into law of this proposed plan, but an allowance of six *per cent.* profits on the actual tangible assets of the corporation for each and every year of its existence.

Most corporations make no profits and declare no dividends for some years after their incorporation. And to tax them when they are beginning to make money, without taking into consideration the years when the

stockholders' money was earning nothing, when the stockholders were devoting their best thought and labor without any, or with small compensation, to make the privilege worth something, would be unfair, unjust and inequitable. A corporate charter is worth practically nothing, unless brains and money are expended to establish it on a paying basis in the business world. The value of a corporate charter represents the privilege plus the brains and the money used to develop it. And the brains and the money expended should be taken into account, when a tax is levied on the profits earned by or through the privilege.

After the State Board of Examiners has ascertained the percentage of actual net profits earned by a corporation for each and every year of its existence, based upon the fair value of its tangible assets for each year, it should allow a profit of six *per cent.* for each and every year since its incorporation; and if the average of net profits earned during its corporate life does not exceed that amount, no tax should be levied. Only upon the excess of six *per cent.* of average net profits earned, should a tax be placed. Such a tax upon profits might be graded as follows:

One-tenth	of first	<i>per centum</i>	of net profits above six <i>per centum.</i>
One-ninth	of second	" "	" " " "
One-eighth	of third	" "	" " " "
One-seventh	of fourth	" "	" " " "
One-sixth	of fifth	" "	" " " "
One-fifth	of sixth	" "	" " " "
One-fourth	of seventh	" "	" " " "
One-third	of eighth	" "	" " " "
One-half	of ninth	" "	" " " "
Six-tenths	of tenth	" "	" " " "
Seven-tenths	of eleventh	" "	" " " "
Eight-tenths	of twelfth	" "	" " " "
Nine-tenths	every	" "	" " eighteen <i>per centum.</i>

It is reasonable to assume that corporations will make all the profits they dare. And if we place a progressive graded tax upon

their profits, their incentive to overcharge and increase their profits beyond a fair amount will be gone, and their time, thought

and energy will be taken from their calculations as to how much they dare to make, to be bestowed in making better the quality of their productions, in extending their markets and in holding their place in the business world. Franchises, special privileges and tariff protection will not produce the valuable monopolies they are doing to-day, for then the monopoly will not be allowed to yield the large profits that are now enjoyed by the few to the exclusion of the many. If a corporation has to pay as a tax nine-tenths of each *per centum* of profit above eighteen *per cent.*, it will not risk the losing of its trade for the sake of making one-tenth of a *per cent.* and the people will get the benefit of a cheaper price and a better article.

In determining the actual net profits of a corporation the Board of Examiners should annually ascertain the fair market value of the tangible assets of the corporation, not taking into consideration the franchise, the capital stock, or its bonds. This value may be obtained by an examination of the officers and the books of the corporation, and of experts in the line of business investigated. The Board should deduct from the total earnings of the corporation the necessary and reasonable expenses of its management, including the actual amounts spent in renewing the plant, the cost of materials purchased and

used, together with the taxes paid on its property, business or profits to all municipalities. And having obtained these amounts, it should by ordinary business methods figure the percentage of profits earned in relation to its corporate assets.

Every ten years the Board of Examiners should ascertain the fixed average of profits earned by each corporation for that period. If the average of profits does not exceed six *per cent.* annually the State should refund to the corporation such moneys received during such period as a tax on its profits above six *per cent.*, or so much thereof as to make the average of profits untaxed equal to six *per cent.*; thus allowing to every corporation an average of six *per cent.* profit on its tangible assets during the period of its existence.

A tax should be levied on all foreign corporations doing business in the State, upon the amount of business done in the State, in the manner provided by the laws of the State of New York. A rate of taxation should be adopted, to make foreign corporations pay the same proportion of tax that is levied on domestic corporations, so as not to drive domestic corporations to wind up their affairs and incorporate in another State, and come back to do business in their old market.



A QUESTION OF LAW.

By E. S.

1. In an evil hour B  
Made a note to an assignee,  
Wherein and whereby  
(I don't know why)  
He promised to pay  
To the order of A,  
Six months hence,  
Twelve cents.
2. One month before that note reached its  
fruition,  
A made up his mind to retire to perdition,  
He leaves a large till,  
But no will — no will!  
And now from all quarters  
The sons, wives and daughters  
Of his sisters and brothers and nephews  
and nieces  
Stand ready to tear his great fortune to  
pieces.  
Actions are started,  
And dear ones are parted;  
Suits of all sorts  
Are begun in all courts,  
And fearing lest some of their plans should  
miscarry,  
Some of the relatives *certiorari*,  
With E. C. & B.  
For the administrators,  
And F. H. & G.  
On the part of relators.  
Actions are lost  
With tremendous cost,  
Actions are won

No one knows when begun,  
And learned decisions  
Are reversed, with revisions.  
Counsel on all side acquire great wealth;  
Stenographers now leave the town for  
their health,  
While the surrogate grand, in his pride  
and his prime  
Is putting on more and more *heirs* all the  
time.  
To cap the climax, without a compunction  
A higher court judge now grants an in-  
junction  
Restraining B,  
Or his partner, C,  
Or his wife, D,  
Or his agent, E,  
Or his counsel, F. H. & G.,  
From paying the note  
That B wrote,  
During the pendency of that action —  
Thus driving both B and the heirs to dis-  
traction.

3. There are the facts:  
Now a question I'll ax  
Which is sure to bore your  
Average lawyer —  
Who is entitled to what, and how?  
Did the law hold good then? And if then,  
why not now?  
And if so, why not? And how long hence?  
And the amount, in dollars, and the in-  
terest, in cents?

## LANDMARKS OF CHINESE LAW.

## I.

BY VINCENT VAN MARTER BEEDE.

## ON HIGHWAYMEN.

The rainy mist sweeps gently o'er the village by the stream,  
 When from the leafy forest glades the brigand daggers gleam. . . .  
 And yet there is no need to fear or step from out their way,  
 For more than half the world consists of bigger rogues than they!

*Li She*; 19th cent. A.D.

IN China there is a Bench of an extraordinarily hard and unyielding fibre — but no Bar (to speak of) — and no jury. That such a condition as this should have existed in the vast territory of Tsin from an Unthinkable Then to a Certain Now, is a thing to wonder over.

There are a great many people in China — about 399,680,000 of them — all children, in the full sense of the word, of their Sire the Emperor, Son of Heaven, Brother of the Sun and Moon, Grandson of the Stars, Lord of Ten Thousand Years, the Imperial Supreme, and what not. The unit of Chinese government, as Sir Henry Staunton has wisely pointed out, is the family, and every province, department, district and community is itself a household. Williams<sup>2</sup> ascribes the wonderful efficiency of the Government to the ancient rule of Yan and Shun,—a strictly patriarchal chieftainship conferred on account of excellent character,—and to the widespread belief that the succession of Yu, of the Hin dynasty, were considered as deriving power from heaven. “When Chingtang, founder of the Shing dynasty, B.C.

<sup>1</sup> This famous poet (Li She), having been caught by brigands, was ordered to give a specimen of his art. The impromptu in the text earned him immediate release. *Chinese Poetry in English Verse*, by Herbert A. Giles.

<sup>2</sup> *The Middle Kingdom*, by S. Wells Williams.

1766, and Wuwang of the Chan, B.C. 1122, took up arms against the sovereigns, the excuse given was that they had not fulfilled the decrees of Heaven and had thereby forfeited their claim to the throne. Confucius upheld these doctrines, but it was not till two or three centuries after his death that kings began to see the wisdom of his views.”<sup>3</sup> Wise those views may have been, but China is pagan and despotic, and pagan and despotic are her laws! “Mutual responsibility among all classes”—Williams’ great phrase—is the secret of power in the carrying out of Chinese law. Government rank is minutely graded; officials watch each other with feline perspicuity, lest they lose their jobs; relatives know that if the black sheep does wrong and jumps the fence they must suffer for his sweet sake; secret societies murder erring members with painstaking unobtrusiveness; and no one dares to lead a rebellion. The Government is a thing by itself, seemingly existing for itself. The Emperor, notwithstanding his vicegerent heavenliness, is expected to obey the laws of his Fathers, which Li founded two thousand years ago. Those *mores maiorum* are everything. There have been few changes in “fundamental and social principles” since “The Ritual of Chan,” by Chan Kung, and Confucius’ “Record of Rites.” One’s parents and one’s brother are always the first consideration. Staunton holds the theory that the movement of the progressive societies of the world has hitherto been a movement from status to contract, but that China has not yet emerged from status; in proof of which he designates the existence in China of the *patriæ potestas*,

<sup>3</sup> *The Middle Kingdom*.

testamentary power, the position of women and slaves, and the absence of a written law of contract. Even Roman law, he notes, is anterior to the publication of the Twelve Tables, 2,200 years ago.

The Emperor's Cabinet Council is composed of four ministers — mighty princes indeed. Beneath them are six supreme boards called Loo-poo. The first (Lee-poo) has four branches, which select officials for the whole Empire, affix seals to edicts and proclamations, and enrol the names of the good and the great. The second board (Hoo-poo) cares for the revenue, the third (Lee-poo) keeps up the ancient religious rites, and preserves the temples endowed by the Government, the fourth (Ping-poo) controls the army and navy, the fifth (King-poo) supervises criminal proceedings, and the last (Kung-poo) is a Board of Public Works. Over each tribunal is placed a chairman who reports to the Cabinet. The main business of the Too-cha-yun, or Board of Censors, is to scent out plots against the government at meetings of the Cabinet and the Boards. The Too-cha-yun also send out spies to the provinces. What a "spotter" is to railroad employ  es in the United States, such is a censor, or his deputy, to the provincial mandarin.

Oppressed though they are, at least the Chinese are not troubled by that Hindoo nuisance — caste. To be sure, one emperor tried to introduce it. The ancient distinctions in the Middle Kingdom were: scholars, agriculturists, craftsmen and tradesmen. The legal classification to-day is: 1. Natives and aliens. In the latter group are included unsubdued mountaineers, aborigines, and boat people. Perhaps the To-min of Ningpo ought to be counted as a separate class. They are musicians and sedan bearers, descendants of those traitors who aided the Japanese in 1555-1563. 2. Conquerors and

conquered. Manchus and Chinese may not intermarry. 3. Freeman and slaves. 4. The honorable and mean, who cannot intermarry without losing the privileges of their class. Here belong aliens, slaves, criminals, executioners, police, runners, actors, jugglers, beggars, etc. "They must pursue honorable and useful employments for three generations before they are eligible to enter literary examinations. Membership in the eight privileged classes is secured only by persons of imperial blood and connections. It should be remembered that rank is entirely distinct from title. . . The mass of the people are further subdivided into clans, guilds, societies, professions and communities."

The eighteen provinces are governed by officials who play a clever game of chess or parcheesi. The people do not count; they are not so much as pawns. Sons and relatives of the Emperor may not hold office in the provinces, nor may an official serve in his native province; consequently Peking is "besieged" by eager office-seekers from whom the best may conveniently be picked. Moreover, an officer is forbidden to marry a wife from the province to which he is assigned (great gossips are they of the bound feet!) or to own land therein, or to give a fat appointment to a brother or near relative; and after three or four years the official must "move on." Manchu<sup>2</sup> and Chinese officials work together. The system of espionage is so exact that every officer reports upon those under him. Officials on trial are obliged to accuse themselves and request punishment, and many of them help to swell the list of 500,000 suicides credited to China in a year. The officials are a shrewd lot, many of them upholders of the proverb: "It is equally criminal in the ruler and the ruled to violate the

<sup>1</sup> *The Middle Kingdom.*

<sup>2</sup> The Manchus (Tartars) overthrew the native dynasty of Ming in 1644. Kwangsu is the ninth Emperor of the Tsing dynasty.

laws," but as a usual thing not susceptible to the truth of the saying: "Let every man sweep the snow from before his own doors, and not trouble himself about the frost on his neighbor's tiles." When he is degraded in rank an official loses "all save honor;" the thing honor does not annoy one much in Tien Chu,<sup>1</sup> where bribery among officials is punished according to the amount taken.

The Blue Book of Chinese officials is red. This "Complete Record of the Girdle-Wearers" appears quarterly in four volumes, 12-mo. There are two extra books of Army and Banner Men. The usual orders of Court are sent to the provinces in script, but extraordinary events are printed on yellow paper, with dragons in the margin. "Standing laws" are carved in black marble; ordinary proclamations of the provincial mandarins are bill-boarded, and sometimes close with: "Tremble hereat intensely," or "I will by no means eat my words." Mandarins know better than to oppress their people beyond a certain point, for section CCX. of the Code provides that any official driven from the capital city and seat of government shall suffer death. Every mandarin of the nine ranks,—and *mandarins* are properly only such officials,—must possess a literary degree. Lower officials have no rank, may be natives of the provinces where they serve, and can be put entirely out of government employ at any time.

Bribery, known as "covering the eyes," or "opening the back door," is a science among the Chinese. The high ranks set days for receiving "favours of esteem." Funds for charity, and "appropriations" (New York has heard of such things), are "charged" with both "principal" and "interest." An

unusually generous subscriber may receive a peacock feather (a baronetcy), and titular ranks are sold for a fair price. However, it is only fair to say that literary achievement carries the candidate along without check. It is among the low class officials that the open palm is most apparent, for military police and officers' servants receive no salary and are expected to make up the deficiency as best they may. Chinese officials have been called experts in misappropriation and speculation. If an officer cannot subdue robbers, he makes a little financial arrangement with them, and horse thieves have been known to bring their "goods" to market, and even obligingly to sell stolen property to the owners thereof.

The effect upon the people of all this extortion is a general callousness to suffering in others and a thorough distrust of officialdom. Since a man is responsible for the doings of his neighbors, and a village for the crime of one of its citizens, fires are allowed to proceed undisturbed, and dead bodies to rot where they fall. During the first war with England many officers killed themselves for fear of punishment when they saw that they could not carry out orders; and not so long ago Chinese interpreters in Canton were held responsible for the actions of foreigners. In South China the people incline to form clans, which cause constant trouble to the Government. Robbery and dakoity are present in all the provinces. Taxes must be squeezed out.

There are three grand orders of mandarins—civil, literary and military, with nine classes to an order. Passing reference has been made to the nine classes. Members of these have been entered in the Red Book and accepted as "expectants," or "candidates," by the Government at Peking; so that by no means every official is a mandarin. Each class is divided into a first and second division, without difference in the uniform. The

<sup>1</sup> A name for China which implies its heavenly character.

<sup>2</sup> "The eight banners comprising 'all living' Manchus and descendants of the Mongolian and Chinese soldiery of the Conquest."—*Things Chinese*.

well-known hat-button does not indicate the office of the wearer, and the peacock feather is an individual honor. On ordinary occasions rank is shown by buttons and girdle-clasps. Mandarins from the first to the fifth class wear a string of beads. A familiar feature of the half-dress uniform is the conical cap with a tassel of red silk or red hair. The civil and literary mandarins wear the figure of a bird, and the military mandarins that of a beast, on the front of their costumes. The court garment is extremely plain, in order to afford a marked contrast to the splendid dress of the Emperor.

The ruler of the province is generally known to foreigners as the Viceroy or Governor-General. He may be compared to the Governor of a British colony, and is always a mandarin of the first class. His lieutenant is practically an associate, for the Viceroy must consult with him on all important questions, and his troops are independent of those of his superior. The lieutenant also has the privilege of reporting directly to the Emperor. The Chinese of Kwang-tung province distinguish the duties of the two men by saying that the Governor controls rivers and the sea, the lieutenant the land. The Superintendent of Finance is a third mandarin whose authority extends over the whole province. The land tax comes into his hands, and it is he who pays the officials. He must not be confused, however, with the Treasurer, who is much lower in the scale. In criminal cases the Provincial Judge is the highest judicial authority in the province. He is expected to quell uprisings against the Government, and the issue of death warrants is among his duties. The Collector of the Salt Gabel also superintends the sale of native iron. He is assisted by a corps of subaltern mandarins. The Grain Collector, the lowest mandarin having general powers, is a kind of Commissary General. The Tau-tai, or Cir-

cuit Judge, is a favorite character in Chinese tales and plays. Five Tau-tai are placed over as many circuits in Kwang-tung province. Military affairs come into the jurisdiction of this official, but not prisons. His duties are various, including the guardianship of corn stores. The Prefects are in charge of the prisons and act as Sheriffs-General. They may be found at military stations in large towns and in those localities where "outer barbarians" appear. District Magistrates derive their titles from the names of their districts, and combine the offices of magistrate, collector of taxes, superintendent of police and deputy-sheriff. Altogether this magistrate is a hard-worked man, obliged personally to attend to details, even to the coining of endless money with holes through it. Every month he must submit a report of all his cases, criminal and civil, and he is held blameworthy for every slip 'twixt the cup of the people and the lip of the mandarin in his district. He must exercise the nicest care in sending up cases at the proper moment. If he should allow rebellion to succeed, he would be degraded two steps, and cashiered, the Tau-tai degraded one step, and so on all the way up the ranks. The poor District Magistrate is thus placed in the unusual position of fearing lest he ruin by his own downfall his superiors rather than his inferiors in office. The Township Magistrate is a Justice of the Peace, with powers to inflict corporal punishment for minor offences, and large powers of arrest. Sometimes he is appointed Inquisitor. The Inspector of Police has the immediate care of the jails and prisons of the District Magistrate. Secretaries, Treasurers and Prison Masters are assistants to upper class mandarins. The Superintendent of Customs in Kwang-tung is sent direct from Peking and brings down upon himself the scornful words of his victims (well-travelled Americans will sympathize):



"After all, he is only one of the Emperor's slaves!"

This official is not entirely free from suspicions of being a scientific smuggler.

The legal salary of the mandarins is absurdly small, but like their Tammany brethren, they manage to eke out a living. Meadows guesses that the highest mandarin "makes" ten times, the lowest fifty times, his actual pay. Fourteen thousand dollars would not be an unusual income for a lower post.

The yamun, or court house, official residence and prison in one, is a "hive of industry," and added to the buzz of talk is the constant "flail-like" sound of the bamboo descending lustily upon the human frame. To the average Chinaman the yamun by day is much more a thing of terror than a haunted house by night. The sanctum of this inclusive dwelling is the private quarters of the chief. There no male servant may enter. The entire household of a yamun varies in number from two hundred to five hundred.

The Shi-ye — judicial advisers and private secretaries — are the nearest approach to a lawyer which China knows. They are the only class which devote themselves solely to the study of the law. They are rarely made mandarins, and are not supposed to act as counselors. Their one business in life is to protect the interests of the mandarins who employ them, — that is, to give the magistrates the cues of their judicial examinations and to see to it that decisions are legal and justified by the facts in the case. The Code of the Board of Civil Office is indeed full of pitfalls for the unwary magistrate. Another duty of the Adviser is drafting and revising documents. Although a person who has universal respect and is almost invariably a man of genuine scholarship and fine legal capacity, the Adviser can never be anything more than the hired servant of a mandarin,

unrecognized by name in official circles, — a prompter, a thinking machine, who is never permitted to be present at official judicial examinations. The punishment-list-Shi-ye specialize in criminal law, while the revenue-Shi-ye turn their attention to fiscal law. The write-report and manage-account-Shi-ye, on the other hand, are nothing more than private secretaries. A mandarin will pay his criminal Adviser from \$5,000 to \$8,000 a year, and a private secretary may draw only two hundred dollars. As a rule every yamun has one Adviser and one Secretary from a class. In a book of anecdotes the story<sup>1</sup> is told of a young man who was accused of the shocking crime of knocking out his father's teeth. The unnatural child was immediately condemned to death, but was left alone for a few moments with an Adviser, who walked rapidly about the room, talking every moment.

"It's a bad case," the Adviser finally whispered in the boy's ear. Thereupon he bit the ear very hard.

"What do you mean?" shouted the boy, jumping up and raising his fist.

"That you are saved! You need only to show the prints of my teeth and say that they were made by your father, whose teeth, being shaky, dropped out!"

The class known as Tai-shu may also perhaps be termed Advisers, since they act for litigants to the extent of drawing up their documents. In order to be qualified, the "notary" must pass an examination before his mandarin. This process is equivalent to a bar examination. If he is successful, the candidate is given the wooden stamps, without which no accusations or petitions may be formally received at the yamun. The notary pastes on his door a large red card telling his occupation and the name of his yamun. His business is supposed to be

<sup>1</sup> See *A Cycle in Cathay*, by W. A. P. Martin, D.D.

confined to putting his clients' accusations into proper form; but the poor fellow is naturally tempted to give a little "extraneous" advice now and then, such as: "You should contrive to provoke your opponent to assault you"—even though there is a risk of the stamps being "forfeited." The Adviser gains his income from fees charged for draw-

ing up the documents and affixing the stamp.

Every chief mandarin at a yamun has his "followers" whose specialty is negotiating bribes,—for instance, from gambling houses. These vermin retainers receive no regular salary. As for the Chai-yu—policemen, bailiffs and turnkeys—they are utterly despicable.

## LAWSUITS AGAINST ANIMALS.

IN the midst of the enlightenment which we are inclined to associate with the latter half of the nineteenth century, it is almost difficult to imagine that there can have been any time when lawsuits were formally carried on against dumb animals with all the solemnity of prosecution and defence, and all the subtleties of the strictest legal procedure. Down to a comparatively late period, however, the lower animals, not only in Europe, but in portions of both North and South America, were considered as being in all respects amenable to the laws. Domestic animals were tried in the common criminal courts, and their punishment on conviction was death; whilst over wild animals the ecclesiastical courts exercised jurisdiction, and inflicted upon them sentences of banishment and death by exorcism and excommunication. According to one French authority, the difference in the mode of procedure applied to those animals which could be taken possession of and brought bodily into court, on the one hand, and to those which were unseizable, on the other. For each course certain casuistical reasons were found. The prerogative of trying domestic animals was supposed to be founded on the ancient Mosaic law, and it is to be remarked, both in this class of cases and in those tried by the

canon law, advocates were assigned to defend the animals, and trial, sentence, and execution were alike conducted with the utmost formalities known to the law.

The proceedings against wild animals and insects in the ecclesiastical courts were exceedingly complicated, and their legality was always disputed by a certain section of canonists. It was held, on the one hand, that the church had an inherent authority to exercise, anathematise, and excommunicate all animate and inanimate beings, even whilst the lower animals, having been created before man, and being thus first heirs of the earth, and having also been provided for in the ark, were entitled to be treated with the greatest clemency consistent with justice. On the other hand, it was contended that, as the lower animals were devoid of intelligence, no such social pact as would confer authority to punish could ever have been made with them; that no penalty attached to injuries committed unintentionally and in ignorance; and that, as the church did not undertake to baptise animals, she could have no authority to anathematise them.

Such arguments as these, doubtless, have the appearance of being most suitable for the pages of Rabelais or Swift, but it is beyond question that they were carried on in sober

earnest, and as a serious matter of jurisprudence. Grouping together for a moment the two classes of lawsuits against animals, it may be said that France seems to have had the unquestionable honor of initiating them, and of seeing the last of them. M. Berriat St. Prix enumerates ninety-two such cases, from the excommunication pronounced by the Bishop of Laon in 1120, against caterpillars and field mice, to the condemnation of a cow on October 12, 1741. Boars and sows are, it need hardly be said, frequent delinquents, their offence generally being the eating of children with whom they had come in contact during their unchecked wanderings along the public roads. At Lavezurg, in 1457, a sow and her six young ones were indicted for having killed and partly eaten a child. After a trial, conducted with all due solemnity, the sow was found guilty and condemned to death, but the pigs were acquitted on account of their youth, the evil example of their mother, and the absence of direct proof that they had actually been concerned in the eating of the child. In 1403, a sow killed and devoured a child at Meulan. The sow was condemned to be hanged, and the following is the bill of costs for the sow's subsistence and execution:—"Expenses of the sow within gaol, six sols; *do.* the executioner who came from Paris by order of our master the Bailli and the *procureur du roi*, fifty-four sols; *do.* for carriage of sow to execution, six sols; *do.* for cord to bind and drag her, two sols, eight deniers; *do.* for *gans* (*sic*), two deniers." The object of providing gloves for the executioner was, no doubt, that his hands should not be sullied by the destruction of a brute beast.

At Basle, in 1474, a cock was tried for the crime of having laid an egg. The theologian, Felix Malleolus, records the voluminous pleadings, and it is stated to have been proved that cock's eggs were of enormous value as

an ingredient in certain mystic compounds; that a sorcerer would rather possess a cock's egg than own the philosopher's stone; and that in certain lands, Satan employed witches to hatch such eggs, whilst from them proceeded animals most injurious to all of the Christian faith and race. The facts of the case were admitted by the defence, but it was pleaded amongst other things that no evil animus had been proved against the cock, and that there was no instance on record of the evil one having made a compact with one of the brute creation. It would be useless to wade through the arguments. It will suffice to say that the cock was condemned to death, not as a bird, but as a sorcerer in the shape of a cock, and was, with its egg, burned at the stake with all the solemnity befitting a judicial execution.

The ordinary method of procedure against animals in an ecclesiastical court was a settled and well-recognized form. It was initiated by the inhabitants of a district who had been annoyed by certain animals. The court then appointed experts to survey and report upon the damage committed. The next step was the appointment of an advocate to defend the animals and to show cause why they should not be summoned. This was followed by their citation three several times, and as they of course did not appear, judgment was given against them by default. Then succeeded a *monitoire*, warning the animals to leave the district within a certain time, and it was held to be necessary that certain representatives of the incriminated species should be present in court to hear the *monitoire* pronounced. Thus, in a trial against leeches at Lausanne, in 1451, a number of leeches were brought into court to receive their warning, which admonished them to leave the district within three days. The leeches did not leave, and the exorcism was consequently pronounced. In this case

it is said to have been so successful that the leeches began to die off immediately. Martin Azpileneta, too, tells us that in Spain a bishop, standing on the top of a rock overlooking the sea, excommunicated the rats, mice, flies, and other similar animals and insects, who were destroying the harvest and the fruit, and ordered them to leave the country in three hours, and that, in compliance with the bishop's injunction, the greater part of the animals concerned, immediately swam to a neighboring uninhabited island, which had been assigned to them, where they could do no harm to anybody. There can be no doubt, however, that the very natural fear that the animals against whom sentence was pronounced might fail to comply with the order of the court was the reason why it was customary to employ all available means of delay in order to avoid actually pronouncing the exorcism. In some cases, indeed, it is recorded that the noxious animals, after being anathematised, became more numerous and destructive than before, such a result being attributed, of course, to the malevolent interference of Satan.

One of the most celebrated lawsuits against animals was that in which Chasseneuz, the Coke of France, was the counsel for the

"dirty animals in the form of rats, of a greyish color, living in holes," of the diocese of Autun, about the year 1510. He pleaded in the first instance for delay on the ground that the rats had not been duly summoned. The priest of every parish in the diocese was then ordered to summon them for a future day. This was met by a demand for a further extension of time on the ground that the rats had so many preparations to make. Again the delay was granted; and when the date then fixed arrived, Chasseneuz pleaded that his clients were entitled to a safe conduct to the court and back to their homes, and that consequently the owners of the cats in the neighborhood ought to give security for the harmlessness of the feline race. This was, of course, impossible, and the result was that the case was adjourned *sine die*. Turtle-doves were excommunicated in Canada in the seventeenth century, and termites in Brazil and Peru in the eighteenth. Enough, however, has probably been said. The eccentricities of mediæval judicial procedure are numerous, but this is perhaps one of the greatest, and one can only conclude that our ancestors must have had an abundance of time to waste, if they were willing to spend it on such absurdities.





THE LIBRARY OF THE MIDDLE TEMPLE.

THE LIBRARY OF THE MIDDLE TEMPLE.

BY EDWARD MANSON,

*Of The Middle Temple, Barrister At Law.*

AS the eye from Waterloo Bridge sweeps the wide bend of the river and the leafy line of the Victoria embankment, stretching from Westminster and the Houses of Parliament to the dome of St. Paul's, it is arrested in its travel by a modern gothic edifice of stone with a highly pitched roof and fine oriel window overlooking the Temple gardens and the broad bosom of barge-laden Thames, alas! no longer "silver streaming," nor set with enameled flowers as in Spenser's day. This is the Library of the Middle Temple, erected in 1859, at a cost of £14,000, to house the growing collection of books—up to that time kept in what is now the new Parliament chamber, adjoining the hall of the Society. To enter the library we must go round by Garden Court, which is on the north side, away from the embankment. Pausing for a moment on the broad stone steps which lead to the library we get one of the prettiest pictures in London—many an artist fixes his campstool to sketch it:—on the right the garden glowing with geraniums or tulips; beyond, the dark background of the old Elizabethan Hall, and straight before us Fountain Court, with its plane trees and flashing fountain. We mount the winding staircase, and pushing open the door find ourselves in a long gothic hall, ninety-six feet long, forty-two feet wide and seventy feet high, with a shadowy roof of carved arches of pitch pine and lighted by cathedral-like windows of stained glass, seven on each side. Once the stained glass of these windows was full length, but so dim was the religious light it cast on the student's book that the lower half was a few years since

replaced by clear glass—to the gain of learning but the loss of art. Pity that the fine proportions of the library should be so broken up by the high cross bookcases—necessary evil—which traverse it athwart: but they have their merit—they form convenient recesses, electric lighted after dark, where the reader can abstract himself from the world and attain to a blissful legal Nirvana.

On the hammer beams may be noticed figures of angels bearing shields with the arms of the Chief Justices who have belonged to the Inn, Gascoyne and Popham, Hyde and Bramston, Saunders and Ryders, Kenyon, Tenterden and Cockburn, and on the base of the hammer beams the arms of the Chancellors and Keepers of the Great Seal, Rich and Clarendon, Somers and Cowper, Hardwicke and Eldon, Stowell and Westbury. Three blank shields on each side are left to encourage the hopes of the rising generation of Middle Temple lawyers. But the chief feature of the library—architecturally—is the large oriel window which overlooks the Thames, emblazoned with the arms of the royal princes, from Richard Cœur de Lion to the present King of England. This window, with its sunny southern aspect, is delightful on a summer's day. From its vantage-ground the eye "exults in its command," and pausing for a moment in its eager quest of learning, turns restfully to view the busy scenes of life below, and muse the aspirations of the poet Denham:

"Oh! could I flow like thee and make thy stream  
My great example, as it is my theme,  
Though deep yet clear, though gentle yet not dull,  
Strong without rage, without o'erflowing full."

But what of the collection of books and manuscripts which the library enshrines? The Inn possessed, it is said, some sort of a library in the reign of Henry VIII., but it must have been a very insignificant collection. The library really began with the bequest<sup>1</sup> of Robert Ashley, a member of the society, who died in 1641. His picture hangs, as it should do, over the door of the library, on the inside. It is three-quarter length, and represents a Spanish-looking man of about thirty-five, with a dark, thin face, Vandyke bearded, dressed in black and wearing a small ruff. Born in 1565, he would be five years younger than Francis Bacon, two years younger than Shakespeare, and it adds no little interest to his personality to think that, living as he did in the Temple, he must have known both well. It was the afterglow of chivalry, and Ashley had a strong tinge of romance in his temperament. "Guy of Warwick," "Valentine and Orson," and "Arthur and the Knights of the Round Table" were the delight of his boyhood: he had ideas and tastes, too, liberal beyond those of the ordinary lawyer. "Finding the practice of the law," says Wood, the antiquary, "to have ebbs and tides, he applied himself to the learning of the languages of our neighbours to the end that he might be a partaker of the wisdom of those nations, having been many years of this opinion, that as no one soil or territory yielded all fruits alike, so no one climate or region affordeth all kind of knowledge in full measure." Among other places he visited the "Escorial," and translated several curious and interesting works from the Spanish, French and Italian.—"Almansor the Victorious King that Conquered Spain," "The Interchangeable Course," "The Kingdom of Cochin China," and "David Persecuted."

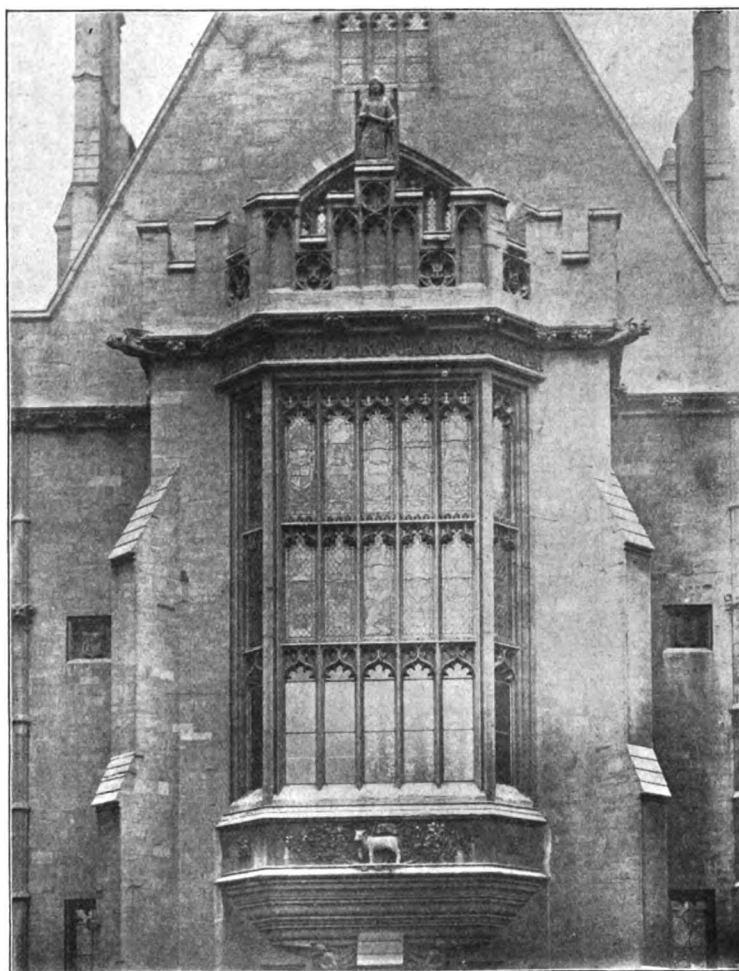
<sup>1</sup> By the terms of the will the library was to be a "public" library, and the testator desired that no student might be excluded whether of our own or any foreign nation.

This catholicity of taste may be seen in his library,— what is there indeed that more reflects the man than his library? The earliest catalogue of the Inn Library, compiled in 1700 by Sir Bartholomew Shower, treasurer, must represent substantially Ashley's library, and it is instructive as a study. It is arranged in classes. History, Geography and Miscellanea head the list, filling eighty-five pages of the catalogue. Theology comes next with fifty-eight pages. Then Biography, with twenty-seven pages. Then Medicine, with fifteen pages. Then Mathematics, with fourteen pages. Then Canon and Civil Law, with ten pages. Then Law, with eight pages,— what a falling off is here! — and finally Politics, with five pages. All these are in various tongues, Latin greatly predominating. A new catalogue was compiled in 1734, "*auspicio et sumptu*" Charles Worsley, the then treasurer. At that time, or to be exact, four years later, the library numbered, according to the "Gentleman's Magazine," 3,982 volumes.<sup>1</sup> Some seventy-nine works were added between 1734 and 1766. This Worsley catalogue, which is in quarto, shows an improvement in being "*ordine dictionarii dispositus*"; its demerit for finding purposes is that a number of different treatises are often bound up in one volume. Some years ago a seeker of knowledge ranging the shelves found a volume lettered "*Idem Liber*." What could this denote? At length he discovered that it was the duplicate of another work in the library, and marked in the Worsley catalogue as above, and the person intrusted with preparing books for binding had taken this for the veritable title of the publication in question. Apropos of this Worsley catalogue there hangs a tale which has just come to light in a letter published by the Historical Manuscript Commission, from among the

<sup>1</sup> Among other benefactors to the library were the Irish Lord Chief Justice Pepys, Elias Ashmole, Bartholomew Shower, and William Petye.

Duke of Portland's papers at Welbeck. The letter is from Henry Carey,—the author of the well known pieces "Sally in Our Alley" and "The Dragon of Wantley," and ancestor of Edmund Kean,—to the first Earl of Ox-

Sunday, the 7th July, 1717,' *written* in margin by Lord Oxford], when your Lordship came to the chapel at Lincoln's Inn, it being the last Sunday to Trinity term and the first after your late signal deliverance from the hands of



Oriel window of the Library of the Middle Temple.

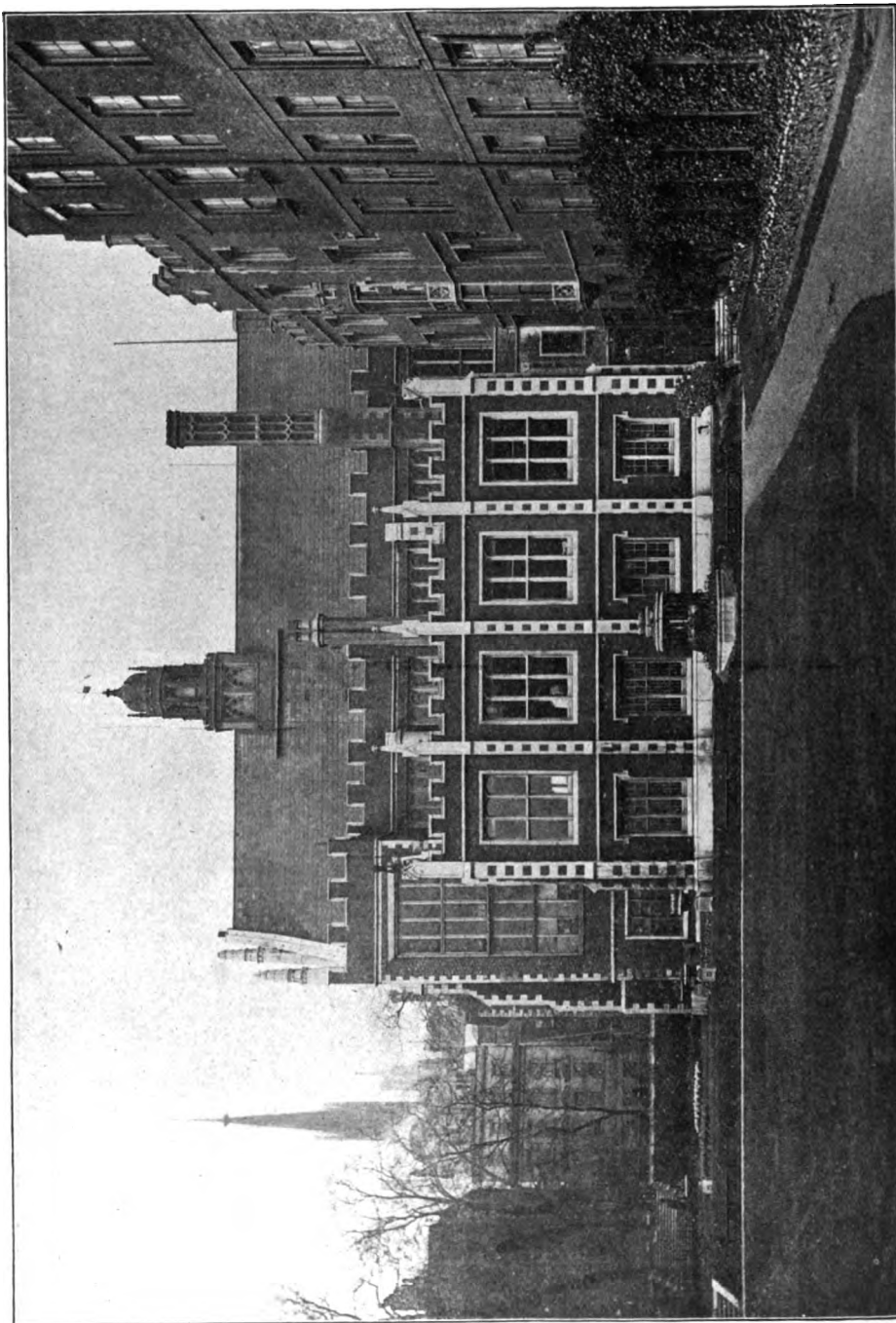
ford. It is dated in the year 1717, and contains a recital of the wrongs which Carey had sustained—or thought he had—at the hands of the Benchers of Lincoln's Inn and the Middle Temple. It happened on this wise. We give it in Carey's own words: "Upon the 2d June, 1717, last ['It was

your enemies.' I being at that time clerk of the said Chapel, set the 124th Psalm,<sup>2</sup> as it is in the new version of Tate and Brady:

<sup>1</sup> Lord Oxford had been sent to the Tower on suspicion of connection with the rebellion of 1715.

<sup>2</sup> "If the Lord had not been on our side when men rose up against us, then had they swallowed us up quick, . . . our soul is escaped as a bird out of the snare of the fowlers," etc.





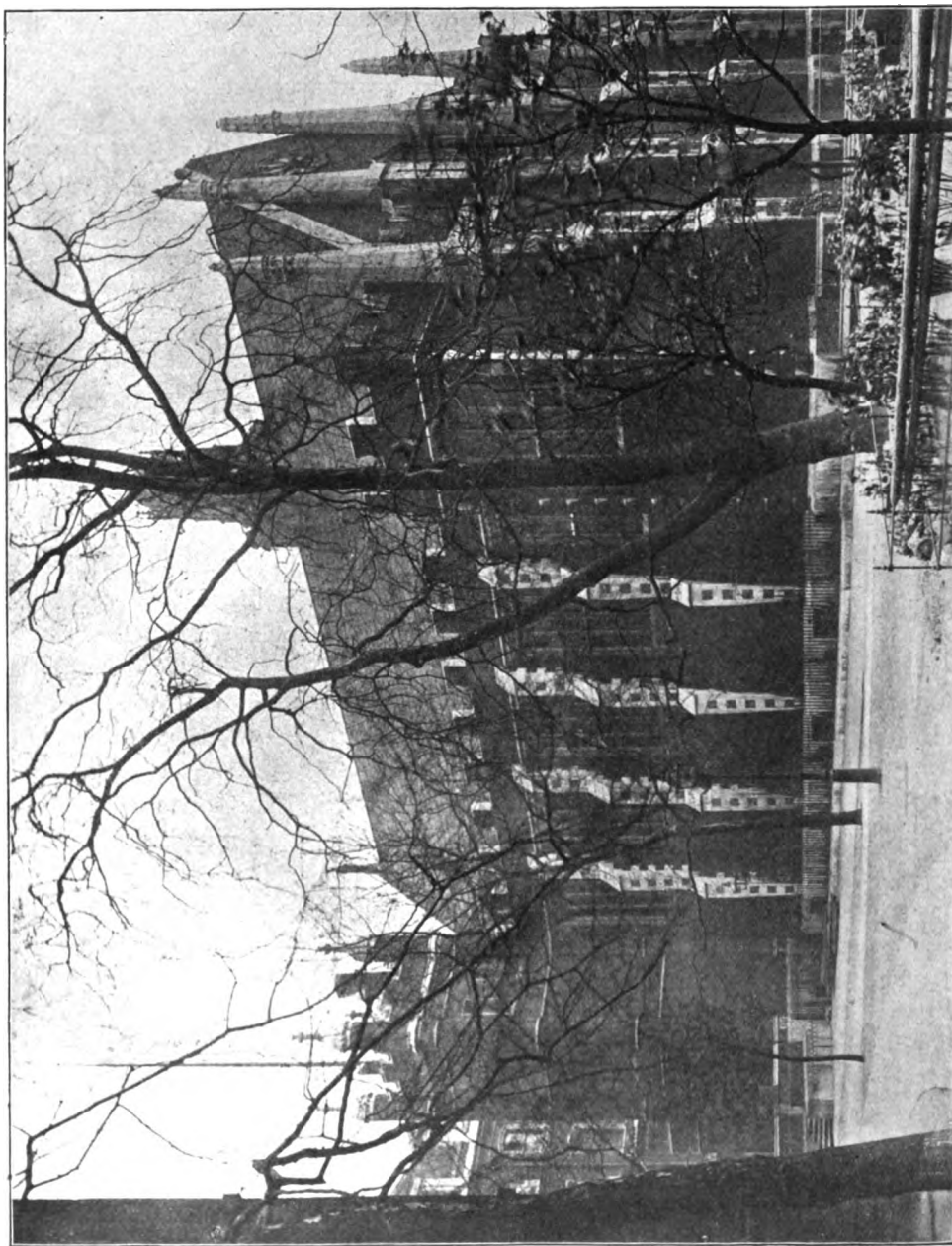
THE PARLIAMENT CHAMBER AND THE GARDEN AT THE SIDE OF THE LIBRARY.

but immediately after sermon, before I had well got out of the Chapel, many of the Seniors of the Inn gathered about me and asked me many questions altogether frivolous, ill natured and ensnaring. Amongst the rest Mr. Handcock distinguished himself in a more particular manner by asking me, with some austerity, whether your Lordship was not my dictator. I was so pestered with the stale, empty jests and pretended witticisms of the Benchers that I withdrew to avoid their clamorous reproaches. The Wednesday following (being the Council night) Sir Joseph Jekyll, Mr. Spencer Cowper and Mr. Carter, then Treasurer and Chairman, began most violently and bitterly to inveigh against me and to lay my setting that Psalm before the Bench as an offence of the highest nature, aggravating their charge with so much heat and vehemence that the Hon. John Hungerford, Esq., and some other worthy gentlemen then present could scarce have room to put in one word on my behalf, so loudly did these inquisitors, like censurers, thunder out their anathemas against me, and being much superior in number to the good few who took my part and would defend me, they passed a vote for my immediate discharge. The next morning one of the servants of the Inn came to acquaint me that they had no further service for me, but that they had dismissed me from my clerkship for being a person disaffected to the government."

Carey's conduct, by the way, looking at the state of parties and the late perils from the Pretender, was certainly indiscreet in the highest degree; it might have involved the Benchers in a suspicion of Jacobitism. Now we come to what concerns the library: "I was at the same time," says Carey, "keeper of the library in the Middle Temple, under John Troughton, Esq., where I employed myself in regulating and reducing to decency and order a place which through long ne-

glect was become a perfect chaos of paper and a wilderness of books, which were mixed and misplaced to such a degree that it was next to an impossibility to find out any particular book without tumbling over the whole. This undertaking cost me about twelve months' hard labour and pains, besides money out of my own pocket to transcribers. However, I went forward with the greatest alacrity because Mr. Ludlow, then Treasurer, encouraged me by repeated promises (which now I may call specious and empty) of reward when completed, as now it is. I having made a new catalogue in five alphabets with columns (all of my own invention) of all the tracts contained in the library, which catalogue is one hundred sheets in folio, and the books are now so regularly ranged, and the catalogue so plain, easy, and exact, that anybody may go directly from it to any required book or pamphlet without any difficulty or hesitation; so that not only the catalogue but even the library itself are evident demonstrations of my labour and instances of their ingratitude to me who egged me on to this work without rewarding me for it."

This catalogue of Carey's is evidently what was afterwards published as the Worsley catalogue. A hundred years later the number of books had increased from a little over four thousand to fifteen or sixteen thousand. To-day they number about forty thousand. The present catalogue is a very full and complete one, and is contained in six manuscript folio volumes,—one a subject matter index, the other five giving the names of authors. The society owes it to the painstaking energy of Mr. John Hutchinson, the courteous and cultivated librarian. Mr. Hutchinson has himself literary associations. He is, interesting to relate, a nephew of Wordsworth's wife, Mary Hutchinson, to whom the poet, in his lines "She was a Phantom of Delight" (written three years after marriage), dedicated



HALL OF THE MIDDLE TEMPLE.

one of the finest poetic tributes ever laid at the feet of womanhood. Mr. Hutchinson has a boy's recollection of his uncle, the poet, as a kind but reserved old gentleman, with blue goggle spectacles, conversing little and musing much. He does not disguise his opinion that the world has thought too much of the inspiration which the poet drew from his sister Dorothy, and too little of what he owed to his wife.

Words have been well called fossil thought, and is not this even more true of books than of words, the books peculiarly of a library like the Middle Temple, which has been accumulating for centuries? There on its shelves are the fossilized strata of extinct forms or phases of thought, once instinct with life and reality. Astrology, for instance. In the Middle Temple Library there are seventy works on this once absorbing subject. One of these is interesting as bearing the signature of Mr. Ashley on the title page, and above it written—what was evidently his favorite motto for it occurs several times :

*"Nulla gravior est jactura scienti quam temporis."*

Some affect, says the author of this treatise, to despise astrology — "*pedibus conculcare*" —but its reasonableness is obvious; thus: the humours of the human body depend on the circumambient air. This is treated as a self-evident proposition. But the circumambient air depends on the influences flowing from the distribution and conjunction of the stars. Having established the science on this irrefragable basis he goes on to demonstrate its indispensableness not only to doctors and surgeons but to magistrates, jurisconsults and theologians. And to-day all this strange cabalistic and occult learning of the astrologists, with its houses, cusps, planets and conjunctions, is represented by what?—Zadkiel's Almanack!

Another subject which greatly exercised the minds — or the imaginations — of our an-

cestors of the sixteenth and seventeenth centuries was demonology and witchcraft. How prevalent the superstition was is shown by the large number of works on the subject in the library.<sup>1</sup> Indeed, a belief in witchcraft was in those days almost an article of the Christian faith,—to doubt or deny it was next door to atheism. Once given this deeply rooted prepossession that there were witches and that they were in league with the evil one, and trifles light as air, the most trumpery evidence, became, even to men like Sir Matthew Hale and Lord Bacon, confirmation strong as proof of Holy Writ. Witness the absurd story told by one of the witnesses in the trial of the witches at Bury St. Edmunds (6 State Trials 647). Here is another sample from one of the old books, of a supposed witch arraigned for trial at Rochester by her vicar. "His," — the vicar's — "sonne (being an ungracious boie) passed on a daie by hir house, at whom by chance hir little dog barked; which thing the boie taking in evill part drewe his knife and pursued him therewith even to hir dore, whom she rebuked with some such words as the boie disdained, and yet nevertheless would not be persuaded to depart in long time. At the last he returned to his master's house, and within five or six days fell sicke. Then was called to mind the fraie betwixt the dog and the boie, insomuch as the vicar (who thought himself so privileged as he little mistrusted that God would visit his children with sickness) did so calculate as he found, partly through his own judgment and partly (as he himself told me) by relation of other witches, that his said sonne was bewitched. He proceeded yet further against her, affirming that always in his parish church when he desired

<sup>1</sup>"The Tryall of witchcraft, with the true Discovery thereof, by John Cotta, Doctor of Physicke: dedicated to Sir Edward Coke, C. J."

"Dialogul Discourses of Spirits and Divels (1601), By John Deacon and John Walker, Preachers. *Villapundus* (*invocatio*)."

to read more plainlie his voice so failed him as he could scantily be heard at all." The vicar had asthma, which might well have accounted for it, but of course it was all the doing of the witch. If this sort of evidence, the imagination of the parties affected, were allowed, no person, as Sergeant Kelynge justly observed, would be safe. In one of the most curious of the old books on this subject, "The discovery [i. e., the exposure] of Witchcraft," dedicated to Sir Roger Manwood, Chief Baron of the Court of Exchequer under Elizabeth,<sup>1</sup> the author, Scott, protests against the credulity on this subject, and the too lightly receiving of evidence of witchcraft; much so-called witchcraft was merely conjuring. The ideas about "Incubus" he dubs "flat knavery." Nevertheless, with a charming inconsistency, this anti-wizard gives us the forms of conjuration for knowing what is spoken of us behind our backs, for obtaining a woman's love, for finding out a "theefe," for hurting with images of wax. Very silly it all seems now; but who can be wiser than his age? "We are too hasty," says Charles Lamb, "when we set down our ancestors in the gross for fools for the monstrous inconsistencies (as they seem to us) involved in their creed of witchcraft. In the relations of this visible world we find them to have been as rational and shrewd to detect an historic anomaly as ourselves. But when once the invisible world was supposed to be opened and the lawless agency of bad spirits assumed, what measures of probability, of decency, of fitness or proportion—of that which distinguishes the likely from the pal-

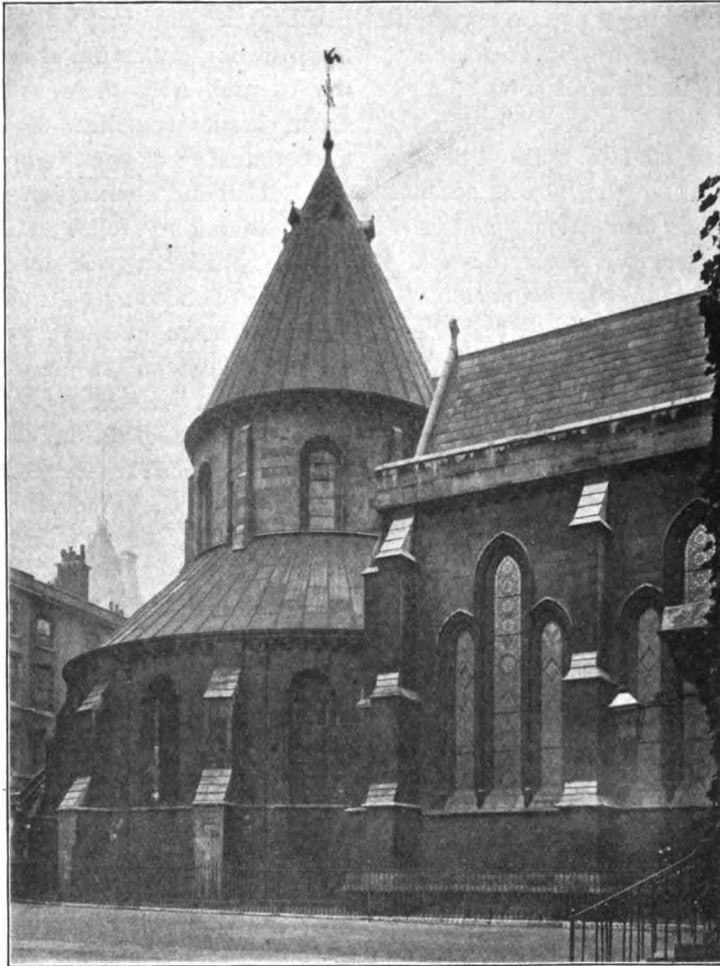
<sup>1</sup> These were nice questions for the lawyers, too. Bodman reported that one confessed that he went out, or rather up, into the air, and was transported manie miles to the fairies danse, onelie because he would spie unto what place his wife went haggng and how she behaved her selfe. Whereupon was much ado among the inquisitors and lawyers to discusse whether he should be executed with his wife or no. But it was concluded that he must die, because he bewraied not his wife, the which he forbare to do *propter reventisio honoris et familie*.

pable absurd—could they have to guide them in the rejection or admission of any particular testimony? That maidens pined away, wasting inwardly as their waxen images consumed before a fire; that corn was lodged and cattle lamed; that whirlwinds upstore in diabolic revelry the oaks of the forest, or the spits and kettles danced a fearful innocent vagary about some rustic kitchen when no wind was stirring, were all equally probable where no law of agency was understood. That the prince of the powers of darkness passing by the flower and pomp of the earth should lay preposterous siege to the weak fantasy of indigent eld, has neither likelihood nor unlikelihood *à priori* to us who have no measure to guess at his policy or standard to estimate what rate those anile souls may fetch in the devil's market." If Lamb had, however, dipped into the pages of Scott's "Discovery" he would have known why—according to Vairus—women are oftener found to be witches than men. It is their "unbridled force of furie, women having a marvellous fickle nature, what greefe soever happeneth unto them immediately all peaceableness of mind departeth, and they are so troubled with evil humours that out go their venomous exhalations." The neurotic woman is evidently not entirely a product of the nineteenth century.

The Canon Law again! This is one of the subjects on which the library is strongest, and it owes its strength in this department, as well as in the Civil Law, to the munificent bequest of Lord Stowell, expended under judicious advice. The works on the Canon Law number one hundred and forty-one, many of them huge folios, marvels of mediæval erudition. There is, for instance, the "Corpus Juris Canonici" of Joannes Petrus Gibert, a vast reservoir of ecclesiastical authorities, mirrowing the mind of the mediæval church, its good and evil, its beauty and its

ugliness. Let us be just to the Canon Law. If it gave us casuistry and the inquisitor, it gave us also equity and ameliorations of the Common Law; for no one can read its sentences without seeing that here is the true

Anatomized," "A Pair of Spectacles for those who Read Baxter," "Run from Rome," "A Currycomb for a Coxcomb," "The Doleful Knell of Thomas Bell" (a Protestant), etc., etc. But in the matter of manuscripts



THE TEMPLE CHURCH.

source of our equity doctrines, introduced and administered by ecclesiastical chancellors.

Of tracts, *miscellanci libelli* (*vulgo Anglice Pamphlets nuncupati*), there is a most varied and interesting assortment: "The Compleat Woman," "The False Jew," "The Army

the library cannot be said to be rich. The most valuable possession it can boast in this way are the "Notes of Cases," by Lord Nottingham; a twenty-four folio volume of "Pleadings at Common Law," by Godfrey Sykes, a pleader of some fame in his time; "Law Cases of the Time of Elizabeth," and

fifty manuscript folio volumes by Fearn, the learned author of "Contingent Remainders." Fearn, great lawyer as he was, was not a man whose whole horizon was bounded by the beauties of a demurrer or the intricacies of a real property settlement. When he might have been making £15,000 a year, he was contented to earn only a competency, and to spend his time on all sorts of ingenious inventions, dyeing morocco leather, optical glasses, a new kind of musket, besides writing a treatise on the Greek accents. These he called his "dissipations," and probably many such schemes might be found among these fifty manuscript volumes.

In modern law treatises and text-books and in law reports, ancient and modern, the library is well equipped, though at the beginning of the century it was not so. It did not even boast at that time a complete collection of Reports. The American Reports are also very fully represented, and there is a fair collection of American text-books. Indeed, English lawyers could ill dispense with such works as Story's "Equity Jurisprudence" or "Conflict of Laws," — our native sort yields nothing so good, — Bigelow on Estoppel, Greenleaf on Evidence, or May on Insurance. But why, if the American Reports are there in such abundance, should not the Reports of the courts of our own Colonies find a larger place in the library? Surely this is a "*hiatus valde deflendus*."<sup>1</sup> In the matter of foreign codes, too, civil and criminal and translations thereof; and in the matter of foreign legal periodical literature, there is also a good deal to be desired. Our insular habit still clings to us. We care far too little to know what other nations are doing and thinking in the domain of jurisprudence and sociology.

A lawyer without literature, it has been justly said, is a mere mechanic. No such

<sup>1</sup> It seems that this deficiency is now being supplied.

stigma, however, need attach to any member of the Middle Temple, so far as opportunity is concerned. There is an excellent collection of standard English works, in prose and poetry, from Chaucer and Hooker to Charles Lamb and Tennyson. The biographies alone number two hundred and seventy-six, and the histories, ecclesiastical and civil, are worthy to rank with them. The Greek and Latin classics are there too; not, it is true, in the latest or choicest editions. Aristotle and Lucian and Demosthenes have to be explored in mighty folios; still, they are accessible, which is a great thing. But scholarship, alas! is becoming a tradition of the past. What advocate in these days would ever dream of launching a classical quotation at a judge or a learned opponent, as Erskine and Law and Scarlett did every day of their lives. The relish for these things has gone, unless it is on the principle on which Becky Sharpe routed Miss Pinkerton by replying to her in French, which that lady did not understand, though she superintended those who did.

But here, while we are exploring, is an interesting document, the warrant under which John Bunyan was arrested and consigned to durance vile in Bedford gaol:

TO THE CONSTABLES OF BEDFORD, AND TO EVERY OF THEM:

Whereas informacon and complaint is made unto us that, notwithstanding the Kings Majties late Act of most gracious gen'll and free pardon to all his subjects for past misdemeano<sup>rs</sup> that by his said clemencie and indulgent grace and fav<sup>r</sup> they might bee moved and induced for the time to come more carefully to observe his Highenes laws and habites and to continue in theire loyall and due obedience to his Majtie, yett one John Bunnyon of yor said towne, Tynker, hath divers times within one Month last past, in contempt of his Majties good Lawes, preached or taught at a Conventicle meeting or assembly under col<sup>r</sup> or p'tence of exercise of Religion in other manner than according to the Liturgie or practise of the Church of England. These are

therefore in his Majties name to command you forthwith to apprehend and bring the Body of the said John Bunnion bee fore us, or any of us, or other his Majties Justice of the peace within the said County, to answer the premisses, and further to doe and receive as to Lawe and Justice shall appertaine, and hereof you are not to faile. Given under our hands and seals this Fowerth day of March in the seaven and twentieth yeare of the Raigne of our most gracious Sovereigne Lord King Charles the Second. A<sup>o</sup> 93 Dni juxta & 1674.

WITT SPENCER.

WILL GERY. St. JO. CHERNOCKE. W<sup>m</sup>. DANIEL.  
T. BROWNE. W. FOSTER.

GAIUS SQUIER.

Blessed warrant! For in those hours of enforced seclusion from the world in Bedford gaol, hours which might otherwise have been dissipated in field preaching, the inspired tinker dreamed that dream—the immortal allegory whose charm no time can wither or custom stale.

What a procession of illustrious figures—members of the Middle Temple—have passed through that library—the old and the new—and turned over its treasures of learning since Ashley's day! Men illustrious not only in law, but in literature, in arts and eloquence. Studious John Evelyn, the Diarist, who had chambers in Essex Court, overlooking the old library, must have dipped into many a curious volume there, albeit he spent his Temple period, he tells us remorsefully, in "dancing and fooling" more than in study. Clarendon must have visited it when he was sketching his "History of the Rebellion." Edmund Burke must have used it when, before he had "soared to the empyrean," he was busy editing that useful publication—the "Annual Register." Blackstone must con-

stantly have turned to its bookshelves when he was writing his stately Commentaries, and Lord Hardwicke when he was preparing his luminous judgments. Lord Eldon must have found in it the materials for his famous argument in *Ackroyd v. Smithson*, and his brother, Lord Stowell, laid there the foundations of his unrivalled learning in ecclesiastical and maritime law and in the law of nations,—a debt afterwards acknowledged and repaid in his splendid bequest to the library. Sheridan doubtless consulted its shelves when he was preparing himself to deliver his famous Begum oration; and may not even the butterfly muse of Tom Moore—for he, too, was a member—have alighted in these "dusty purlieus of the law?" There have come Talfourd and Mansfield and Curran, Leach and Jekyll and Erle, Wynford and Pollock and Ashburton, Grattan and Jervis and Gifford, Charles Dickens and Thackeray, the brilliant Cockburn and the silver-tongued Coleridge. And to-day the Inn has still names worthy to rank with those of the past, Lord Lindley and Sir Richard Henn Collins, the New Master of the Rolls, Mr. Justice Wills and Mr. Justice Phillimore,—still the torch of learning is being handed on.

Gibbon, in his Autobiography, has recorded his regret that he had never *engrafted* himself on one of the great professions. The phrase is a striking one, and carries a profound truth. From great institutions, their traditional glories, their immortal vitality, we draw an inspiration and a strength which, if it does not always lead on to victory, dignifies and ennobles the individual life.





## A FIGHT FOR PRIMITIVE RIGHTS.

BY HENRY BURNS GEER.

IT is gratifying to know, in these latter days of trusts, combines, and other accredited mercenary institutions that there are men so deeply imbued with the love of nature, and the sports of the primitive or aboriginal man, that they will go the full length of the law to retain what they believe to be their natural rights, as inherited from their forefathers.

A lawsuit in defence of this instinct, and these rights—a suit now famous in Western Tennessee and Kentucky, was very recently decided by the Supreme Court of the former State, sitting at Jackson.

It is of national interest, because it involved a body of water different in some respects from that of any other lake or stream in the United States, so far as we have record; being none other than the famous "Reelfoot Lake," a body of water that was born of a great natural convulsion within the period of the white man's occupancy of this country. It lies very close to the Mississippi river, and intersects the State line of the two States named above. Nearby, on the western shore of the great river, is the historical village of New Madrid, Missouri. Here, in 1811, occurred the seismic disturbance known as the "New Madrid earthquake,"—a disturbance of *terra firma* greater than any that has happened since, and probably the greatest since the formation of the continent of North America. The shocks occurred at different intervals for two or three days; there were heavy detonations, and hissing sounds like the escaping of heated vapor, or steam; the earth rocked in wavy undulations and cracked open, leaving great fissures in various places; and, it is recorded that men of well-known veracity asserted

that the current of the river was stationary, if not actually reversed, for several hours.

The chief settlements at that time were on the western side at and about New Madrid, an old Spanish trading post, or fort; and when the hunters and trappers, after the excitement attending the great natural convulsion had subsided, again ventured into the forests on the eastern shores of the river, and returned to New Madrid with the startling information that the earth over there had sunk and a great lake formed that was from two to five miles wide in places, and about twenty-five miles long, they were scarcely believed. Investigation, however, proved the truth of their assertions, and it was soon known and established as a fact, that "Reelfoot Lake"—child of the great convulsion of mother earth—had been born. In some parts of the lake the great forest trees had entirely disappeared beneath the water; while in other sections their tops still protruded above the waves.

When the great river rose to the flood line, during the "June rise,"—the season of the annual flood tide—it swept over the newly formed lake, and when the waters of the river receded the lake was thoroughly stocked with a magnificent assortment of fish. And, later, when the frosts of the late autumn came, the wild geese, brant and ducks of the North came down, and made a winter resort of the latest formation of mother nature in the Mississippi Valley. And so it has been recurring again and again, for nigh onto a hundred years; until "Reelfoot Lake" has become a name revered by sportsmen both at home and abroad.

Modern agencies have been employed to improve the quality of the fish in the great

lake, to beautify its borders, and to make it more attractive to the wild fowl named, by sowing rice and other grain of like nature along its shores and shallows. Hardy backwoodsmen erected their humble cabins near by, and by means of rod and gun augmented their annual incomes from a pleasureable source; this — for several generations past.

With the lapse of time, however, the great forests along the shores of the lake were denuded of their more valuable timber, and the agents of the lumber milling interests began prying into the secrets of nature, and trying to see the forest trees that had gone down in the cataclysm that formed the lake. Their efforts were rewarded with the knowledge that the trees were still sound beneath the waves. Wealthy agriculturalists looked longingly at the shallows of the lake, and dreamed fond dreams of the fertility there submerged, and the possibility of its being bared to the plow and the harrow.

And then, like a thunder-clap from a clear sky, came the announcement that "Reelfoot Lake" had been quietly bought up by some unknown agency, and was to be drained! The prime mover of the scheme was hastily ferreted out, and legal action to restrain such an unpopular action was taken by the men who regarded it as an infringement on their sacred rights as freemen. A great legal battle was on. The people who lived in the vicinity of the lake felt that they were fighting for their natural, or primitive rights, and they were warmly seconded and abetted by the sporting, or rather, sportsmen's fraternity from several of the adjacent towns and cities, and by those who were interested in tourists and other visitors during the gaming season.

The defendant was such in the fullest sense of the word, and he was thrown on the defensive from the very first. While it was very probable that the lake could be drained by means of ditching to the river, aided by hydraulic pumps, yet the people looked upon the whole thing as something sacrilegious. God, in his wisdom had so recently formed the great body of water, and it had been a source of so much pleasure and profit to the people, that to turn the waters away that He had thus gathered to them could not result in other than evil, — and the people would not have it so.

The first legal bout was won by the plaintiffs, the lower court rendering a decision in their favor. The defendant, however, nothing daunted, appealed the case to the Supreme Court of the State of Tennessee. There the fight was a strong one, and long drawn out. The plaintiffs, however, won again.

The Court held that, while "Reelfoot Lake" is not a navigable body of water in a technical sense, it is so in the ordinary sense; and that the riparian owners have such rights in the waters that the owners have no right to drain it.

And thus the American lake that "came after," the one body of water in this country that was not here when the white man first penetrated "beyond the Mississippi," will, by the grace of the law, continue to exist as a great living monument to the greatest natural convulsion of the earth in Northern America since the advent of the white man therein; and further, as evidence of his love of the primitive and the natural in his surroundings.

## LORD BOWEN.

IN an interesting and appreciative article in *The Law Times*, "E. M." relates the following anecdotes of Lord Bowen, the "Claimant" referred to being the famous Tichborne claimant :

Bowen appeared against the Claimant — with Coleridge as his leader — both in the trial at *Nisi Prius* before Chief Justice Bovill and in the criminal trial "at Bar" before Lord Chief Justice Cockburn and Justices Mellor and Lush, and rendered his leader invaluable aid in both. It was Bowen, it was said, who invented in consultation the phrase, "Would you be surprised to hear that —?" with which Coleridge introduced so many of his questions to the Claimant in his cross-examination. The phrase passed into a popular catchword, but without its real significance being understood. "The object with which it was devised," says Sir Herbert Stephen, "was to abstain from giving in the form of the question the least hint as to whether it would be correctly answered in the affirmative or in the negative."

Three long years did this portentous case drag on, but it gave Bowen an opportunity of describing the scene in a graphic little *jeu d'esprit* :

"Amid the case that never ends,  
We sat and held a brief,  
Mathew and I, a pair of friends,  
And one a withered leaf."

"Mathew" was the present Lord Justice — "a withered leaf," as he facetiously termed himself, because the prolongation of the trial was alienating all his clients.

"Meanwhile about us and afar  
Again arose the storm;  
Kenealy and the Chief at war,  
Each in the best of form.  
Of virtue, science, letters, truth,  
They talked till all was blue ;

Of Paul de Kock, the bane of youth,  
Of Bamfield, Moore, Carew :

If fools are oftener fat or thin  
Which first forget their tongue ;  
Why all tobacco mixed with gin  
Is poison to the young :

And whether Fielding's better bred,  
Or Sterne so full of fun :  
Poor Mathew sighed and shook his head,  
The will of God be done."

A good lawyer can never be said to be wasted on the Bench, yet there is a great deal of judicial work at *Nisi Prius* which can be as well, if not better, done by a man of no great talent or legal erudition, but gifted with shrewdness and knowledge of the world, and familiar with the rules of evidence. Bowen's intellect was too fine an instrument for this rough work — cutting blocks with a razor ; his judgment too critical and fastidious ; juries did not understand him. The following story is a good illustration : He was trying a case of burglary with a Welsh jury, and it was urged for the defence that the prisoner was in the habit of walking on the house-tops at midnight, and had merely taken off his boots and dropped into the house out of curiosity. In summing up, Bowen said to the jury : "If you believe that the prisoner considers the house-tops the proper place for an evening stroll, and that the desire to inspect the inside of the houses was but a natural and excusable curiosity, you will acquit him and will approve his conduct in showing so much consideration as to take off his boots for fear of disturbing the sleepers." The irony was unmarked ; the jury took him seriously, and acquitted the prisoner. He never tried the ironical vein again. It recalls the story of Lord Kenyon trying an action for a penalty for shooting game without a license. "Gen-

tlemen," said the defendant's counsel, "it is true that they have sworn my client fired at the bird, that it fell dead, and that he bagged it. It is of no use to deny that. But how does it appear that the bird was killed by the shot? What proof is there that it did not die of fright?" And the jury thought there was none.

Brilliant, versatile, vivacious, overflowing with "intellectual conviviality" and playful wit, no wonder Bowen was a *persona grata* in London society. How gracefully could he turn a compliment! Some ladies on a Swiss tour had been climbing to a perilous eminence on an Alpine crag. "You have solved, ladies," said Bowen, "the problem which perplexed the schoolmen — how many angels can stand on the point of a needle." "Good phrases," as Beatrice says in "Much Ado About Nothing," "are and ever were commendable," and Bowen was an excellent phrase-maker. The unadorned plainness of speech of a brother judge troubled him. "There is a distressing nudity," he said, "about A. L. Smith's language." "Struck with sterility" was one of the happy expressions he coined to describe premises not rateable for unproductiveness. A lecture which he delivered on "Education" is strewn with such flowers as these: The "system of competitive examination is a sad necessity. Knowledge is wooed for her dowry, not her diviner charms"; "You may polish the pewter till it shines without its becoming silver"; "Instruction ladled out in a hurry is not education"; "In ancient times, when duty to the state was the keynote of civilisation, education was that culture of mind and body which tended to turn out the ideal citizen."

A jurist he once playfully defined as "a man who knows something about the law of every country except his own," and at another time remarked of volunteers: "Volun-

teers are not, I believe, liable to go abroad except in case of invasion."

Someone had mentioned a work entitled "Defence of the Church of England, by a Beneficed Clergyman." Bowen suggested, "In other words, a Defence of the Thirty-nine Articles, by a *bona fide* holder for value."

"On another occasion," says Sir H. Cunningham in his admirable sketch of the judge, "reference was made to the fact that a publisher, who was popularly credited with driving somewhat hard bargains with authors, had built a church at his own expense. 'Ah!' Bowen exclaimed, 'the old story! *Sanguis martyrurum semen ecclesiæ.*'"

The plaintiff in a certain case claimed a right to a piece of uninclosed land, and grounded his claim on the fact that his donkey had been habitually pastured upon it. The judge at the close of the argument inquired whether the plaintiff claimed the land through his accredited agent, the donkey. "Yes, my Lord," was Bowen's prompt reply; "my contention is *Qui facit per asinum facit per se.*"

His *jeux d'esprit*, classical and otherwise, are charming. Here is a specimen given by Sir Henry Cunningham — a poetical request for a lift to the then Lord Chancellor's breakfast in 1883, addressed to his friend Mathew, now the Lord Justice:

"My dear J. C., Will you be free, To carry me, Beside of thee, In your buggie, To Selborne's tea, If breakfast he, Intends for we, On 2 November next D. V., Eighteen hundred eighty-three A.D., For Lady B., From Cornwall G., Will absent be, And says that she, Would rather see, Her husband be, D dash dash D, Than send to London her buggee, For such a melancholy spree, As Selborne's toast and Selborne's tea."

"What a libel on me!" adds Lady Bowen.

## A LAWYER'S STUDIES IN BIBLICAL LAW.

### FAMILY SOLIDARITY.

By DAVID WERNER AMRAM.

THE union of all the members of the family under the supremacy of the patriarch was the archetype of the union of allied families under the clan chieftain, and in this manner family solidarity was broadened to tribal solidarity. At a later stage in the history of the Jews, this principle was extended to the union of the tribes forming a nation under the headship of the king. In all of these forms the underlying bond of union was belief in the descent from a common ancestor, necessarily involving the blood relationship of all the persons constituting these several political divisions. Originally this kinship of the members of the family and tribe was actual, but in the course of time it became largely fictitious owing to the free admixture of alien blood. Many nations mingled their blood with that of the Hebrews throughout the long history ending with the destruction of the Temple at Jerusalem. The theory of the kinship of all the members of the family was not affected by this adoption of strangers, for the stranger by coming into the family or tribe was, by a legal fiction, presumed to be of its blood. We see a similar process now going on in our own country. The English language and spirit predominate here and foreign elements rapidly lose their identity, and in so doing become completely incorporated into the American body politic. It is not unusual to hear recent immigrants speak of the adoption of the Constitution by "our fathers."

Family, tribal, and national solidarity are by no means peculiar to the Jews, although from the strange and remarkable part that they have played in the world's history atten-

tion has been attracted to them in an unusual degree, and they have been popularly accredited with an especial racial affinity for each other, a notion that has been a fruitful theme for novelists and anti-Semitic agitators. This solidarity is peculiar to no race or people. It finds its origin in the constitution of human nature and not in the peculiar religious or political character of a people.

Among the primitive Hebrews, as among other primitive peoples, the family was a petty political body, largely independent of all others, wandering about under the leadership of its patriarch and looking upon other nomadic families with suspicion and distrust. It is not difficult to understand that under such conditions the instinct of self-preservation would strongly knit the members of the family together for their mutual protection. The necessity for mutual help and the feeling of interdependence thus engendered among the members of the family spread to the tribe and the nation. Under such conditions arose the notion of blood vengeance, and the Goël or redeemer whose duty it was to fight for his kinsmen, to ransom him, to protect his property, to marry his widow, and to avenge his death; he was a dramatic exponent of the sacred ties of blood relationship.

One interesting aspect of this question may be considered at length. Deuteronomy (xxiv, 16) has the following law: "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers. Every man shall be put to death for his own sin." The existence of this law necessarily implies that before its

promulgation fathers were put to death for their children, and children for their fathers. This was in accordance with our theory that, as Sir Henry Sumner Maine puts it, "A crime was a corporate act and extends in its consequences to many more persons than have shared in its actual perpetration; if the individual is conspicuously guilty, it is his children, his tribesmen or his fellow-citizens who suffer with him, and sometimes for him." (*Ancient Law*, page 122.) There is no case mentioned in the Bible in which the father was put to death for the son's crime, but there are several instances of the reverse. Achan, who had stolen some of the spoils of war, was punished by death and his entire family, his sons, his daughters, his cattle, and his property were destroyed with him. The act of the father had made the entire family accursed (Joshua, vii. 24-25). (And see "The Trial of Achan by Lot," GREEN BAG, December, 1900.) The manner in which the Gibeonites took vengeance for King Saul's breach of faith is characteristic, although the Gibeonites were not of the families of the Hebrews but a remnant of the Amorites who had lived in the land before the conquest of Caanan by the Hebrews. When David became king the Gibeonites petitioned him to deliver seven of the sons of Saul to them to be hanged for the crime of their father, committed many years theretofore. David acceded to their request, and delivered seven of the grandsons of King Saul to atone for his crime (II Samuel, xxi, 5-9). A dramatic instance of the application of this principle is found in the case of Naboth's vineyard, in which vengeance was taken on Jehoram, the son of King Ahab on the very land which King Ahab had through perjury and murder wrested from Naboth (II Kings, ix, 25-26). (And see "The Case of Naboth's Vineyard," GREEN BAG, October, 1900.)

Although, as we stated above, there is no

case in the Bible in which the father is slain for the crime of his son, there is a suggestion of it in the story of the slaying of the Shechemites by Simeon and Levi, the sons of Jacob. They, becoming incensed at the crime committed against their family honor by the violation of their sister Dinah, fell upon the inhabitants of Shechem and put them to the sword. Jacob, their father, complains to them and expressed his fears that their act would bring vengeance upon him and all his house (Genesis, xxxiv, 30). It was a rude justice that made each man responsible for the act of the members of his family, and in those days, in which national government was unknown, it was perhaps the only way in which society could maintain itself. Every man was a policeman in duty bound to see that the members of his family kept the peace, under penalty of suffering personally for their transgression.

The law in Deuteronomy above quoted provided that every man should be put to death for his own sin, and thus ended the notion of the corporate nature of crime. It was one of the steps in the transition from the theories of the old family law to the modern conception, according to which the individual is directly and solely responsible to the law for his act, irrespective of his filiation or his personal status.

During the reign of King Amazia of Judah this Deuteronomic law was observed by the king. The Biblical record makes special note of this fact in these words, "And it came to pass as soon as the kingdom was confirmed in his hand, that he slew the servants which had slain the king's father, but the children of the murderers he slew not, according unto that which is written in the book of the law of Moses, wherein the Lord commanded saying, The fathers shall not be put to death for the children, nor the children be put to death for the fathers; but

every man shall be put to death for his own sin (II Kings, xiv, 5-6).

One of the reasons for this law was, in all probability, the abuse of the right of the Goël to slay the murderer of his kinsman. The Goël was lawfully entitled to take revenge on the murderer, and under the theory of the old law he could kill the members of the murderer's family also, slaying the father for the crime of the son, and the son for the crime of the father. Every such death led to further retaliation, and resulted in the establishment of a blood feud between entire families and tribes and even nations. In a nomadic life such a condition of affairs might be tolerated, but it was entirely incompatible with life in settled communities, and the law fixing the responsibility of the crime on the wrong-doer and punishing him only, was the result of the extension of the instinct of self-preservation from the individual to the community, for the self-preservation of the community required protection of the life and property of its members.

Old ideas die hard; and even as late as the days of Jeremiah it was necessary for the prophet to emphasize the individual responsibility of every man for his own acts, in the face of the old popular conception that the children must suffer for the father's wrong. "In those days," says Jeremiah, "they shall say no more the fathers have eaten the sour grape and the children's teeth are set on edge, but every one shall die for his own wickedness. Every man that eateth the sour grape his teeth shall be set on edge." It is here seen how the old conception of the family responsibility had fixed itself in popular speech as a proverb, which, with the well-known pertinacity of proverbs, was still current among the people long after all reason had departed from it.

Many years afterwards the prophet Ezekiel had to preach a sermon to the people on the

same text. In the eighteenth chapter of the Book of Ezekiel this doctrine of individual responsibility is set forth with burning eloquence. Psychologically it is interesting as showing how persistent old ideas are, and how extraordinary are the forces that must be brought to bear upon them to effectuate any change. A proposition that seems quite obvious to us required a tremendous outburst of oratory and prophetic zeal to impress it on the minds of the people of those days, and even then it found acceptance only among the few.

Although the Deuteronomic law put an end to the old family responsibility for crime committed by one of its members, nevertheless in some other respects the family responsibility continued for a long time, and that was probably the reason why the people in the days of Jeremiah and Ezekiel were still dominated by this idea. Children were assets for the payment of debts, and they could be called upon by the creditor of the father to satisfy his debt or be seized and sold for its satisfaction (II Kings, iv, 1; Matthew, xviii, 25). The fact that after the establishment of the legal proposition of individual responsibility for crime, family responsibility still continued to exist in some other cases gave rise to some confusion of ideas. It is often supposed that the Deuteronomic law which put an end to family responsibility for crime is contradicted by that portion of the Third Commandment which reads, "I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children even to the third and fourth generations of them that hate me, and showing mercy unto thousands of them that love me and keep my commandments;" but this passage in the Decalogue is not a law. It is simply a poetic way of conveying a certain moral truth. If this passage be taken literally, as all laws should, it will

readily be seen to be self-contradictory. If, for instance, the father is guilty of idolatry, then according to this text he and his son and grandson and great-grandson would be punished for the crime; yet, if we suppose that the son was not an idolater but a pious and God-fearing man, then according to the second part of the text, mercy would be shown to him unto the thousandth generation. Furthermore, if the grandson is again an idolater like the grandfather, it would be difficult to determine under a literal construction of this text, whether he was to be punished for the sin committed by himself or for the sin committed by his grandfather, or whether he was to be unpunished because of the virtue of his father. Obviously, therefore, this text is not a law, but a sermon. It simply gives expression in a rhetorical manner to the well-known social fact that children suffer for the deeds of their father, and that they enjoy the results of their fathers' virtues, not by reason of any legal enactment, but through the force of a certain undeterminable public sentiment. By making this distinction between the legal and ethical views of the question, we can understand how the notion of family responsibility continued to exist in the popular mind even after it had been legally abolished. It will always continue to be a strong theme for preachers and moralists.

As was above suggested, the theory of the kinship of members of the family was not disturbed by the admission of strangers having alien blood. Adoption by proper formalities was not unknown, and was undoubtedly frequently practised among the ancient Hebrews. Strangers taken into the body of the Hebrew people by adoption were usually prisoners of war or freedmen. The early nomadic life of the patriarchal age precludes the idea of the extensive adoption of strangers in other instances than these. When city

life was established and persons from different parts of the world mingled with the Hebrew communities, many, no doubt, settled among them and became absorbed in the body politic. The person adopted was probably taken into the family that had no children, for the purpose of keeping the family alive and providing an heir. Eliezer of Damascus seems to have been adopted by Abraham as his heir apparent, and he occupied that position until the birth of Isaac (Genesis, xv, 2-3). He is spoken of as "a son of the house," which he could only have become by some mode of adoption. Mordecai, who appears to have been childless, seems to have adopted Esther as his daughter (Esther, ii, 17). The law of the Levirate Marriage, reference to which has been made, furnishes a special case of adoption in which the son of the widow by her second husband is considered to be the child of her first (deceased) husband.

There was probably a larger proportion of foreign elements in Israel by reason of mixed marriages than by reason of the adoption of strangers. As a result of all this admixture, it is difficult to determine how far the present so-called Jewish race characteristics are originally Jewish or what influence admixture with non-Jewish people has exerted upon the race. From Egypt, a mixed multitude went out with the Hebrews (Exodus, xii, 38) and from that time down to the time of Ezra, history records frequent intermingling with foreign people. In Ezra's time, the severity with which the foreign women and their children were expelled left its impress upon the whole subsequent history of the people, so that thereafter such union with non-Jewish people became exceptional.

The importance of legal fictions in the history of civilization is nowhere better shown than in the instance above mentioned, where the notion prevailed among the people that



they all descended from a common ancestor. This legal fiction has united peoples and nations, and made brothers of strangers and enemies, thereby incalculably promoting the progress of civilization.

It may be said without exaggeration that legal fictions which many people affect to despise have done more for the cause of civili-

zation than any other legal institution. They made it possible in every period of the world's history for reforms to find their way into society by the retention of old forms modified so as to admit of wider application. They arose out of the necessities of advancing civilization, and are to this very day among its most useful instruments.

### LONDON LEGAL LETTER.

SEPTEMBER, 1902.

THE Bar Library, which is under the roof of the Royal Courts, has recently received a very valuable gift of a complete set of statutes and sessions acts of all the States and Territories of the United States. The donor is Mr. C. E. Bretherton, who was for many years a practising lawyer in the United States and for a long time thereafter the representative in London of one of the largest American transcontinental railways. He joined the Middle Temple in 1884, and, though not frequently seen in the English courts, has taken the liveliest interest in all matters connected with English and American law. The value of his gift may be best appreciated when it is known that it comprises the only complete collection of American statutory law in England, and probably in Europe.

There are no less than seven libraries in connection with the Inns of Court, viz., those of Lincoln's Inn, the Inner Temple, the Middle Temple, Gray's Inn, the Bar Library, the Probate Library and the library of the Incorporated Law Society. In addition there is a law library in connection with the British Museum. But in none of these libraries, nor in all of them combined, is there a complete collection of law reports or American law text-books. It is more remarkable

still that in none of these libraries nor in all of them combined is there anything like a complete collection of English colonial law. Here in the heart of the Empire the law literature of the Empire other than that which is purely English is of the most fragmentary character. It has been stated on reliable authority that there are twenty-five libraries in the United States each of which is more completely stocked with English law books, including the statutory law and the reports of the English colonies and the crown dependencies than all of the London law libraries combined, even if in this aggregate is embraced the law books of the British Museum. The busy practicing American lawyer, not merely in New York or Boston, but in the commercial centres of the Western States, has at his hand the entire field of the common and chancery and statutory law of England and her colonies. On the other hand, an English barrister engaged in the Privy Council in an appeal from one of the colonies, or instructed to advise on the law of one of the distant members of the British Empire, would be at a loss to know where in London to find his authorities, and, in many instances, he would only discover that they were not to be had at all in England, and that the nearest place of access to them was an

American law library. As to American law the condition of affairs is still more embarrassing. In some of the libraries there are no State reports whatever, and in others caprice and shelf-room seem to determine what shall be kept up. In one of the largest and most important of the libraries the only reports of all the Western States are those of Kansas!

Where there is any desire to make complete collections the lack of shelf-room seems to be considered an insuperable objection. It is undoubtedly true that the unrestricted and senseless output of American law reports is the great evil with which all librarians have to contend, and it will doubtless continue so long as the reprehensible practice in the United States of judges reserving judgment in every case and writing elaborate opinions upon long-settled and rudimentary propositions of law is maintained, but it should not be accepted as something which cannot be dealt with. It is not true, however, as to colonial reports and it is still less true of American statutory and text-book law. The other objection urged against the completion of the sets of foreign law books is that they are not often called for and that they are useful only to a very limited class of professional men—those chiefly who make a specialty of practice in the law of countries other than England.

The real reason why the law libraries accessible to English lawyers are so deficient is not far to seek. It may be found in the fact that there are too many law libraries in London and no apparent sense of community of interest in those who manage them. The Inns of Court bear practically the same relation to the Bar that colleges bear to a university. If there was no university library at Oxford or Cambridge and each college should act independently, and with jealousy of every other, in attempting to build up its

library, the student and book-lover would not tarry long at the homes of our English universities. The libraries of Lincoln's Inn and of Inner and Middle Temples each contain complete sets of the United States reports and of the reports of a few States, while all together do not contain all the reports of even the principal States. If the authorities of the various governing bodies could only meet and consider the matter they would find that by assigning to each of the libraries the duty of keeping up a certain section of the foreign law, the whole field would be easily and inexpensively covered. If, for example, now that the Bar library has been given a start by Mr. Bretherton, the library committees would combine to assist that particular library to keep up the statutory law of America, the other libraries might rid their shelves of all American statute books. In the same way there could be no object in the Middle Temple giving any shelf room whatever to any United States or State reports, if by agreement the American reports should be taken in at the Inner Temple library, in which there would be sufficient shelf room, if the American and colonial reports and statutes and digests and text-books to be found in other libraries were given up. The American text-books might be assigned to one particular library and colonial statutes and reports to another. Thus by a community of interest the general convenience of all the members of the bar might be profitably served.

The other and perhaps the more important reason why our law libraries are such things of shreds and patches is because, with possibly one or two exceptions, there is not a bibliologist or a true lover of books among the governing bodies of the libraries. In the United States most of the private bar libraries are maintained by voluntary subscriptions and have but slight, if any, endow-

ment. The Inns of Court libraries, on the other hand, are kept up by appropriations from the funds of what are popularly supposed to be rich corporations. Yet the American library manager, despite the restricted funds at his disposal, is constantly struggling for completeness. His agents have standing orders to supply books as they appear and to search for copies to fill out sets in which the library is deficient. His estimation of a law library is that it is not merely a collection of working tools for a practising lawyer,—it is a warehouse in which should be stored everything likely to be of use to writers of law treatises, to the students of comparative legislation and to those who wish to seek into the history and development of the law, not merely in one country but in all countries.

It is putting a very low estimate on the value of American law books in this country when it is objected that they can be useful only to those who make a specialty of American law. There is hardly a week passes in which some case involving questions of American law is not heard in our courts. There is hardly a family in the Kingdom which has not some connection by ties of blood or interest with the people of the United States. Thus arise enquiries as to the law of descent and distribution, or marriage and divorce, of the rights of aliens to hold property, of the status of English corporations in the several States, of the jurisdiction of the various courts, and of rules

of practice and procedure. Every student of the law in England knows that American law had its origin in English law, and that the common law of England prevails throughout the various States, except in so far as it has been altered by statutes or varied by judicial decisions. If the practising barrister could ascertain that there was some library in London to which he could resort with the full assurance that he would there find a complete and up-to-date set of American law books, he would not be obliged to advise his client to go to America or an American lawyer whenever any question involving American law arose. It is at present the common practice for the solicitor to seek advice from his correspondent in New York upon any matter relating to the law of any State in the United States. In the majority of instances the New York lawyer, in turn, refers it to his local correspondent. Thus a delay of some weeks results and large costs are incurred. The expenses that are thus needlessly thrown away would be saved, many times over, by keeping up to date the American authorities in any one of our libraries.

Fortunately a good work has been begun, through Mr. Bretherton's generosity, in the Bar Library, and those who are most interested in the matter can only hope that this gift may stimulate a general interest which will result in the acquisition of a complete collection of colonial and American law books accessible to the English bar.

STUFF GOWN.



# The Green Bag.

---

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

---

Communications in regard to the contents of the Magazine should be addressed to the Editor,  
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

---

*The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.*

THE series of articles entitled "A Century of English Judicature," by Van Vechten Veeder, Esq., which appeared in the last volume of THE GREEN BAG, received so much favorable notice from our readers that we take especial pleasure in announcing, for next year, two important series of articles by the same able writer.

The first series of articles, which will begin in the January number, will be called, "A Century of Federal Judicature." It will be a sketch of the justices of the Supreme Court of the United States along the lines of the former sketch of English Judicature. The case bibliography will be somewhat exhaustive. Marshall, Story, Taney, Curtis, Miller, Field, Bradley and Gray will be fully treated. Washington, McLean, Grier, Nelson, Clifford, Swayne, Chase, Strong, Waite and Blatchford, will also receive due attention. Of the present justices only an exhaustive list of leading opinions will be given.

The other series will be entitled "The Judicial History of Individual Liberty." It was suggested by Justice Miller's statement in *Ex parte Bain*, 121 U. S. 12, that in the construction of the language of the Constitution we should place ourselves as nearly as possible in the condition of the framers of that instrument. Referring to Article V. of the Constitution he said that the framers had undoubtedly been for a long time absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the necessity of providing proper safeguards for the future. This series of articles will therefore illustrate the encroachments which the framers had in mind in formulating their doctrine of individual liberty, by systematic examination of the English State Trials for treason, conspiracy, sedition, criminal

libel, etc. The subject will be treated in three divisions: from Tudor times to the English Revolution; from the Revolution to the adoption of the United States Constitution; and, as illustrating what the founders succeeded in avoiding, from 1789 to present times.

---

FOR cheerful reading we commend to all householders with empty coal-bins a recently published pamphlet,<sup>1</sup> by Heman W. Chaplin, Esq., of the Boston bar, which discusses the timely subject of "The Coal Mines and the Public." What, if any, legal remedy is open to the public for ending a situation which is fast becoming unbearable, is a question which not only has a strong theoretical interest for the lawyer, but also comes close home in a practical way to almost every person in the community. The best treatment of the subject which has come to our notice is that contained in the pamphlet above mentioned, a summary of the more important parts of which we give below.

The material facts are first summed up:—"that practically the whole existing and available source of supply of anthracite coal for more than twenty millions of people in the Eastern States is in a territory of five hundred square miles, more or less, in the State of Pennsylvania;" that not only is "at least two-thirds of [this] whole mining property in capacity of output owned or held under lease by one or another of seven railroad corporations," but that "these corporate owners, by arrangements among themselves or their stockholders, are for practical purposes a unit;" that these same railroad corporations "controlled practically all the coal-carrying business from the mines and did not compete with each other;" that by a combina-

<sup>1</sup>THE COAL MINES AND THE PUBLIC. A Popular Statement of the Legal Aspects of the Coal Problem, and of the Rights of Consumers as the Situation Exists Sept. 17, 1902. By Heman W. Chaplin. Boston: J. B. Millet Company. 1902.

tion between these corporations, and substantially all the independent mine owners and operators in the region" a uniform price for different kinds of coal was "fixed monthly for coal delivered free on board vessels at tide-water;" and "that the present members of the coal combination (including, as it does, the coal carrying roads and the owners of mines) and their predecessors in title and in business, have, during fifty years or more, invited the public to build and plan their business and domestic affairs upon the expectation of a constant supply of enormous quantities of anthracite coal from this region and the delivery of it out of the mining region, at proper shipping points, all at a price affording a proper compensation for the coal, the mining of it, and the transportation of it to these shipping points, but a price also consistent with the practical continuance of use of it by the public for business and domestic purposes;" and that "upon this reasonable expectation and reliance on the part of the public—an expectation and a reliance invited and encouraged by the mine owners and the coal-carrying companies—is founded the whole industrial and domestic economy—one might almost say, the existing form of civilization—of the population of the eastern part of the United States." Mr. Chaplin then considers, first, "The Rights and Remedies of the Public," and secondly, the "Procedure" for enforcing these remedies.

His argument is based on two main propositions: that "all real estate, of whatever character, is subject to the right of the public in many respects to restrict the use of it, or to require affirmative action in respect to it on the part of the owner," and that "every man, by inviting others to deal with his property, creates himself, to that extent, a trustee of his property towards such persons, and puts himself and his property under a limitation, and—where affirmative action is required by good faith—under obligations of affirmative action." The common example of this rule of invitation is, of course, the liability of inn-keepers and common carriers; but its principles are "not limited in modern life to the specific forms or application of them which were made by the early law, but exist and are capable of being applied, up to the fullest requirements of their spirit, to new conditions arising in modern society." As an example of this

doctrine in its modern form, *Munn, v. Illinois*, 94 U. S. 113,—the grain elevator case,—is cited, as illustrating "the principle that whoever so conducts his property or his business as to enter into relations with the public, and leads them to depend upon his services and the use of his property, thenceforth holds his property and his services no longer as private property, but subject to a superior and dominating interest in the public,—that is to say, holds them in trust for the public, and subject to public control."

There is, of course, another feature which enters into the matter,— "the feature of virtual monopoly." "If," says Mr. Chaplin, "the 'virtual' monopoly feature for the time being of existing elevators in Chicago presented such an element of monopoly as to subject the elevators of Chicago to public rights in them, far more does the monopoly feature of the Pennsylvania coal mining region operate, in and of itself, and apart from other considerations, to subject the property to rights of the public, when the public have once been led by the original owners of the mining lands and their successors down to and including the present owners, to base their business and domestic conditions on a reliance upon this source of supply."

The relations between the public and the corporations controlling the mining and carrying of coal is summed up in the following words: "From the principles and authorities above stated and cited, and in particular from the decision of the Supreme Court of the United States in the Chicago grain elevator case, it seems to follow without question that the anthracite coal mines in Pennsylvania, legal title to which as parcels of real estate is in various corporations and individuals referred to at the beginning of this pamphlet, are held by them subject to the right of the coal consuming public of the United States to have a continuous supply of coal from them at reasonable prices; and that the railroad corporations above-mentioned, in their aspect and capacity of common carriers, are bound to take out of the anthracite region all the coal thus mined, and to deliver it at the proper and customary general shipping points from which consumers may get it, and that—there being no particular statute of Pennsylvania upon the subject—the right is one which may be enforced through the ordinary tribunals of justice."

"It is undoubtedly true—and allusion is made to it in the opinion [in *Munn v. Illinois*]—that the public right in one's property or services, being dependent upon the fact of the holding out of the property or the services to the public, may be terminated by a withdrawal of the property from an offer of public use . . . but this [right of withdrawal] is obviously subject to the qualification that one cannot abruptly, and without reasonable opportunity to the public to change their own affairs accordingly, terminate his relations with the public. . . . Applying this qualification to the Pennsylvania coal mining, it is apparent that the relations between the owners of the coal mines and the coal mines themselves, on the one hand, and the inhabitants of the United States, on the other hand, have been of such slow growth and have become so intimate, and have reached so far down toward the very roots of the existence of modern society in the United States in its present form, and involve such an infinite number of details of distributive shipping by land and water and wholesale and retail distribution to the ultimate consumers, that from this point of view alone the owners of the Pennsylvania coal mines, if they could by any means free themselves from the public easement, could do so only after granting years of full notice and of opportunity to the public to arrange the fabric of modern society upon a basis other than that of Pennsylvania anthracite coal."

Coming to the question of procedure, Mr. Chaplin maintains that at least three practical remedies lie open, namely, a bill in equity, praying for the appointment of a receiver, a writ of *mandamus*, and a suit under the Sherman Act. The first of these remedies is, in his opinion, the most effective.

If a suit in equity be brought, "the question of the choice of tribunals, as between a State court and a United States court, in respect to any given suit, would have to be determined for the particular suit according to various considerations; but in case of any general concerted movement on the part of the public to enforce their right to an immediate supply of coal, and at a proper price, the controversy would probably find itself ultimately centered in a Circuit Court of the United States sitting within the State of Pennsylvania." Theoretically the proper

persons to bring suits—outside of proceedings by public law officers—would be "the whole class of consumers or would-be consumers" of coal; but under a familiar rule of procedure "a small number of representative persons of a class may bring suit in their own names, in behalf of the whole class."

"There is, however, another method available which might perhaps appeal to the public as more convenient or desirable. There are many forms in which present legal representatives of the public might take action. The United States Government and the various States of the Union, and all subordinate governing bodies, such as counties, cities and towns, school boards, hospital, almshouse, and prison trustees, or boards, are not only political corporations or bodies but large consumers of coal, and almost all of them, from the United States Government down, have power to contract for coal and to buy coal, and, in case they cannot get coal, through unlawful action or inaction of others, power to enforce their right to coal. It needs no statute or new authorization of any kind for any of these bodies, or the official law officers of such of them as have official law officers, to initiate proceedings such as are suggested above. It is, therefore, open to the public of the country,—if and in so far as they, in considerable numbers, in any locality, desire to force this matter to an issue,—to set the ball rolling through their existing public representatives; and it is in the power of those public representatives, of their own motion, if they feel that public sentiment so desires, at once to institute proceedings. The President of the United States may direct the Attorney General to have the United States, in its capacity of a consumer of coal, file a bill in equity asking for a receivership, in order that the United States may have coal,—not as a sovereign, but as a purchaser,—to warm the White House and the Capitol and the Federal buildings scattered throughout the country. The Attorney General of a State, or the official law officer of any political subdivision of a State, may so proceed, and any city, town, county, school board, prison board, or almshouse board which may not have a formal and regularly employed law officer, but employs counsel from time to time as it has need, may employ such counsel and itself proceed to enforce its supply of coal."

Taking up the second course of procedure, Mr. Chaplin says that he "has suggested receivership proceedings instead of *mandamus*, not because *mandamus* might not be availed of in the present case, but for three reasons: first, because the procedure in *mandamus* is much less elastic than the procedure in equity; second, because it might be necessary, in *mandamus*, to seek a State court: and third, because, in *mandamus*, probably immediate provisional relief could not be had, pending the determination of the cause, but the complainants, in addition to their *mandamus* suit, would very probably be obliged still to institute a suit in equity, — either an independent suit, seeking relief by receivership, or, at least, an ancillary suit in aid of the *mandamus* proceeding. It is, however, proper to allude to the *mandamus* procedure, partly because of its close pertinency to the matters now in question, and partly for the reason that — without regard to the question of *immediate* relief — a *mandamus* proceeding might offer a convenient form of compulsory arbitration, which many persons are now calling for, in that it might open up an investigation of the right of the corporations in question to cease operations as they have done during the last six months, including an investigation into the merits of the coal strike as between the operators and the miners, — an investigation which might be of great value for the future, and might not prove necessary to be gone into in a receivership suit."

The third remedy pointed out is by suit under the Sherman Act, which is held to be "applicable to the present situation, and could be invoked to make the procedure in some respects more convenient, and to put on a pressure." This Act was passed by Congress under the power vested in it to "regulate commerce among the several States."

"The words 'in restraint of commerce' in the statute have been very broadly construed by the Supreme Court of the United States; and it has been laid down by the court that the phrase means, not merely *unreasonable* restraint, but *any* restraint, and that the statute, therefore, forbids absolutely any combination which tends to restrain interstate trade or commerce, as well as any attempt to monopolize any part of it.

"This statute is probably the most radical statute in character that has ever been passed

by Congress. In a variety of particulars it departs from the settled rules of judicial procedure, which apply to all, or practically all, the vast body of other congressional legislation. It has seven distinct operations, as follows:

"*First*. It makes all such combinations illegal and null.

"*Second*. It makes participation in them criminal, and punishable by heavy penalties.

"*Third*. It authorizes prevention by injunction of the acts forbidden, thus radically departing from the general principle of law that a court of equity will not interpose by injunction to prevent the commission of a crime.

"*Fourth*. Such preventive power is vested in all the circuit courts of the United States, in whatever State sitting, without regard to the question of locality of the wrongs or of the persons accused.

"*Fifth*. The Act makes it the duty of the several District Attorneys of the United States, under the direction of the Attorney General of the United States, to commence proceedings in equity to enforce its provisions.

"*Sixth*. It provides for seizure and forfeit of any 'property owned under any such unlawful contract, or by any such unlawful combination, or pursuant to any such unlawful conspiracy, and being the subject thereof, and being in the course of transportation from one State to another.'

"*Seventh*. Any individual injured in his business or property by reason of anything forbidden or declared unlawful by the Act, may sue therefor in a circuit court of the United States, without regard to the amount in controversy (that is, however small his damage may be), and may recover, not merely the damage he has suffered, but threefold the damages that he has sustained, and also, in addition to the ordinary costs of suit, his reasonable disbursements in the employment of counsel, — a provision found, it is believed, in no other statute of the United States."

Two cases under the Sherman Act are considered at some length: *Knight v. American Sugar Refinery Company*, 156 U. S. 1, decided in 1894, where it was "held that upon the facts as presented to the court by the bill in equity — not, it will be observed, upon the facts as they may have existed, or upon the facts universally known then and now to the public — the acts

complained of were not within the Sherman Act, inasmuch as the facts alleged and proved showed only a monopoly of manufacture, and not of interstate trade or commerce;" and *Addyston Pipe and Steel Company v. United States*, 175 U. S. 211, decided in 1899, which was "a proceeding in equity by the United States against certain manufacturers of iron pipe to restrain them from carrying out a combination for abolishing competition in bids, and thus enhancing prices," and in which, dealing with what Mr. Chaplin considers "a situation much broader than the present coal situation, the court held the Sherman Act applicable, and restrained the combination in question as a combination in restraint of interstate commerce."

The conclusion which is reached under this head is that "the combination of mine-owners and coal-carrying railroads, commonly known in its present form as the 'Coal Trust,' [is] a combination and conspiracy illegal, punishable and preventable under the Sherman Act," and that "if representative consumers desire to have these remedies, including the more drastic of them, invoked, to shorten the agony, it will become the duty of the Attorney-General of the United States, upon application to him, to apply the remedies."

It should be borne in mind that, so far as the right of the public is concerned, the merits of the controversy between mine-owners and mine-workers are immaterial. And one has only to recall the vigorous action of receivers appointed and backed by the Federal Court in the Debs railroad strikes, to be convinced that if a Federal Court can act at all in the present case it can act effectively.

Whether Mr. Chaplin's argument is sound, only the Supreme Court of the United States can finally determine. But it is clear that the public good demands that the right of the consumer to an adequate supply of coal at a reasonable price under the law as it stands at present be determined, to the end that, if such right does not now exist, suitable legislation be enacted, which shall put it beyond the power of either mine-operators or mine-workers to deprive the community of a commodity which, as society is now constituted, is an absolute necessity. But we believe that it will be found that a remedy exists under the present laws.

# NOTES.

"WHAT is your name," inquired the Justice.

"Pete Smith," responded the vagrant.

"What occupation?" continued the Court.

"Oh, nothing much at present; just circulating around," replied the prisoner.

"Retired from circulation for thirty days," drily remarked the Court.

UPON one occasion the late J. B. Ryan, of Pottsville, Pa., one of the most fearless as well as one of the ablest lawyers in Central Pennsylvania, was arguing an important case before the Supreme Court of the State and in the course of his argument, something was said about the large number of decisions from the lower court that were affirmed by the higher tribunal.

"Why, Mr. Ryan," said one of the Justices, "don't you know that four-fifths of all the decisions that come before this Court for review are affirmed by us."

"Yes, your honor," replied Mr. Ryan, "I knew that, and when you get to affirming the other fifth, we'll abolish the Court."

THE mystic power of a title is shown by the following story told of Charles P. Harris, of the Rutland, Vermont, bar. At the time of the Tichborne trial, some thirty years or so ago, Mr. Harris, then a young man, was in London. The court room was crowded from day to day—so crowded, indeed, that a Supreme Court judge from this side of the water with whom Mr. Harris was travelling had been unable to obtain admission. The latter was very desirous to be present once at the celebrated trial, and as a last resort wrote a polite note to one of the leading counsel in the case, expressing this desire. To the signature to the note were added the letters "C. E."—standing for the degree of "Civil Engineer," granted Mr. Harris on graduation from a technical school,—and the words "United States of America." The note was taken in by a court messenger, who returned and ushered Mr. Harris into the crowded court room, where the "C. E." was courteously welcomed by the famous barrister. But to this day Mr. Harris is in doubt whether the letters which proved an open sesame were interpreted to mean "Court Examiner" of the United States, or to stand for some other office of distinction.



Root's Connecticut Reports are not considered high authority by the Massachusetts courts. In a case before Chief Justice Shaw the counsel on one side cited a case from these Reports, upon which the Chief Justice said, "This court considers Root's Reports as radically defective." This is the only joke that Chief Justice Shaw was ever known to make.

To avoid prosecution on the charge of usury the loaners of small sums in the West resort to various methods. The "double-room" system is used in many cases to secure two hundred and forty *per cent.* from those people of the working class who are hard pressed for money. These small money-loaners generally make their office at their home, and the woman is represented as the capitalist. The husband acts as the agent. He receives all applicants for loans, and informs the would-be borrower of a "five" that he can secure the amount for a month, but that as agent for the capitalist he will have to charge a commission for his services. This agreed upon, he goes to the door leading to the next room, asks his wife if he may make the loan, and having obtained her consent, returns to make out the papers. These papers consist of a power of attorney which the borrower is asked to sign giving the agent the power to hold the wages of this man at the place where he is working after such a certain pay day in the sum of six dollars. That there may be no opportunity for catching him, the agent of the woman draws up a check for that amount which is given to the unsuspecting borrower with the tacit understanding that he is to return one dollar at once for the services of the agent in securing the loan and making out the papers. This is frequently worked and many times the borrower seeks damages later for having his wages tied up, but in the justice courts little sympathy is given the men who so recklessly sign the papers of sharks, and they generally have to take their medicine.

"LORD FIELD," says the *Law Journal*, "was wont to relieve the routine of the common-law courts by a touch of humor. A number of jurymen, failing to answer to their names, he fined them all 10/. 'That should convince these gentlemen,' he said, 'that silence is very golden on occasions like this.'"

MANY years ago a young man in Gloucester, Massachusetts, conceived the idea that he had talent for portrait painting and opened a little studio. Soon afterwards he made a trade with Captain Woodbury, of Beverly, to paint his likeness. If it was a success, he was to be paid ten dollars, if not, he was not to take it. After several sittings the artist wrote him that the picture was finished; it was delivered to Woodbury for examination, but Mr. Woodbury declared it looked no more like him than it did like the painter himself, and refused to accept it. Whereupon the painter brought a suit against Woodbury before a magistrate. Woodbury retained Rufus Choate. At the trial Choate had present the portrait, and concluded his argument by saying:

"Look at this; it is not a likeness of anything in the heavens above, in the earth beneath, or in the waters under the earth, therefore it is no sin to worship it."

A CHARACTERISTIC story (says *The Law Journal*, quoting the *Daily Telegraph*) is told in the library of the Four Courts of an incident in the early professional life of Lord Ashbourne. As a youthful junior he is said to have found himself associated in a Chancery cause of considerable difficulty with Mr. Piers White, Q. C., an eminent equity leader. At a consultation the latter pointed out to his young, and presumably diffident, friend that there were four possible points to be made, three of them meritorious and the fourth of a less promising kind; and suggested that when he (the leader) had dealt with the first three, Mr. Gibson, in following him, should touch lightly on the fourth. "Not at all," said Mr. Gibson, "you shall discuss all the four points and I will then repeat your entire argument in a louder and more confident tone." And he did.

THE influence of some of the new laws passed by the last legislature in Iowa, is being noted by many throughout that State. The provision for compulsory education and the naming of a truant officer is being taken advantage of in some counties, while in others it is considered somewhat of a joke. In certain sections, truant officers have been named by the school directors and unruly children are being brought before

the teacher. In other places the work is considered almost without value, as the law provides that no child can be compelled to attend school more than twelve weeks during one year. Those who are forcing children into the school argue that the influence may be of such good that it will keep them there for a longer term. The new law giving the judge of the district court the power to issue commitments against persons found guilty of being an inebriate to the department for dipsomaniacs at the insane hospital in Mount Pleasant for at least a term of one year or longer if not cured of the habit, is having a universally good influence. A large army of men has been sent to the department, and the dread of the twelve months at the institution is said to have sobered some of the annoying inhabitants of small communities.

IN the reign of Philip and Mary the grievance of long beards was not removed. An order was made in the Inner Temple that no fellow of that house should wear his beard above three weeks' growth upon pain of forfeiting twenty shillings. In the Middle Temple an order was made in the fourth and fifth of Philip and Mary, that none of that society should wear great breeches in their hose, after the Dutch, Spanish or Almain (German) fashion, or lawn upon their caps, or cut doublets, on pain of forfeiting three shillings and fourpence; and for the second offence the offender to be expelled. In the first and second of Philip and Mary a gentleman of Lincoln's Inn was fined five groats for going in his study gown into Cheapside on a Sunday, about ten o'clock in the forenoon.

— *Brayley's Londiniana.*

AN old and well known traveller, who has recently settled in Chicago, while coming in from Pewee valley the other afternoon told an interesting story about Henry Clay, the great Kentucky statesman. The story teller in his youth lived in Mr. Clay's district during the time when Henry Clay was at his prime as a lawyer.

"A man was once being tried for murder," said the narrator, "and his case looked hopeless indeed. He had without any seeming provocation murdered one of his neighbors in cold blood. Not a lawyer in the county would touch the case.

It looked bad enough to ruin the reputation of any barrister.

"The man as a last extremity appealed to Mr. Clay to take the case for him. Every one thought that Clay would certainly refuse, but when the celebrated lawyer looked into the matter his fighting blood was roused, and, to the great surprise of all, he accepted.

"Then came a trial the like of which I have never seen. Clay slowly carried on the case, and it looked more and more hopeless. The only ground of defense the prisoner had was that the murdered man had looked at him with such a fierce, murderous look that out of self defense he had struck first. A ripple passed through the jury at this evidence.

"The time came for Clay to make his defense. It was settled in the minds of the spectators that the man was guilty of murder in the first degree. Clay calmly proceeded, laid all the proof before them in his masterly way, then, just as he was about to conclude, he played his last and master card.

"Gentlemen of the jury,' he said, assuming the fiercest, blackest look and carrying the most undying hatred in it that I have ever seen, 'gentlemen, if a man should look at you like this what would you do?'

"That was all he said, but that was enough. The jury was startled and some even quailed on their seats. The judge moved uneasily on his bench. After fifteen minutes the jury filed slowly back with a 'Not guilty, your honor.' The victory was complete.

"When Clay was congratulated on his easy victory, he said:

"It was not so easy as you think. I spent days and days in my room before the mirror practising that look. It took more hard work to give that look than to investigate the most obtuse case.'" — *Louisville Courier-Journal.*

LORD STOWELL (Sir William Scott) possessed a pungent wit. A celebrated physician said to him, rather more flippantly than be-seemed the gravity of his cloth: "Oh, Sir William, after forty a man is either always a fool or a physician."

"Mayn't he be both, doctor?" was the rejoinder, with an insinuating leer, and half drawling voice.

WE are indebted to *The Law Times* for the following items:

*A propos* of enterprising clerks in solicitors' offices, the following story reaches the *Daily Chronicle*. A youth was engaged as junior clerk, and by way of filling in his time and testing his worth on his first day he was told to write a letter demanding payment of a debt from a client who was long in arrears. To the great surprise of his employer a cheque for the amount arrived the next day. He sent for the young clerk and asked him to produce a copy of the letter which had had such an astonishing result. The letter ran as follows:

"Dear Sir,— If you do not at once remit payment of the amount which you owe us, we will take steps that will amaze you!"

The promotion of that young clerk was rapid.

A magisterial doctor on the bench at Cardiff, according to the *Western Mail*, expressed surprise to find a brother doctor willing to kiss the police-court Bible when taking the oath. The mode of taking the oath varies considerably in courts of justice. The English method of kissing the book is well known, and many are the complaints that the practice tends to an undesirable propagation of microbes. The Scotchman solemnly holds his hand above his head. The Jew is sworn on a copy of the Old Testament with his hat on. The Chinaman breaks a saucer in pieces, vowing at the same time that he will speak the truth lest his soul suffer after the manner of the saucer. In Switzerland, it appears from a case just heard in London in which certain Swiss were concerned, the witness shakes hands with the magistrates and promises to speak the truth. This seems as sensible a way as any; nevertheless, one does not feel inclined to envy the lot of magistrates in the little Republic. In our own country we are sure the great unpaid would not welcome this contact with the great unwashed.

A court-martial assembled at the 29th ult, says the *Times*, at Le Mans to give a fresh trial to Jean Voisin, a soldier who in 1891 was sentenced to death at Rennes for murder and robbery, but whose sentence was commuted to hard labour for life. In 1900, on strong evidence of his innocence, he was pardoned, and returned to France. A woman keeping a wineshop near

Cherbourg was murdered and robbed early one Monday morning, and a peasant affirmed that he saw Voisin enter the premises. Moreover, several comrades alleged that a knife left near the spot belonged to him. He was absent from barracks at the time, and did not return till Wednesday night, when there were blood stains on his clothes, which he explained by saying that his nose had been bleeding. He alleged that having got drunk on the Sunday he went to the cottages of his mother and aunt, but both denied having sheltered him. He was consequently convicted. Attempting to escape from Cayenne, he was condemned to two years of the "double buckle," inflicted, as will be remembered, on Dreyfus. A convict at Cayenne named Langlois, an ex-sergeant at Cherbourg, acknowledged, however, to a fellow prisoner that he was the murderer. He had, indeed, at the time claimed as his property an epaulette found near the wineshop, stating that he had lost it, but this circumstance was set aside as irrelevant, though Langlois was afterwards convicted of embezzling the pay of the reservists. On his death-bed Langlois repeated his confession. Informed of this, Voisin appealed to friends in France, and obtained a pardon, his mother and aunt retracting their denials. The conviction was quashed, and his second trial will occupy several days. The "double buckle" has made him lame in one leg, so that he has had to ask permission to be seated in court. The court-martial concluded on the 2d inst. There was some difference of opinion, in spite of this confession, as to the real murderer. Voisin, at his first trial, denied having passed by the victim's house; whereas a peasant saw him, and it was proved that he must have done so in order to reach his mother's cottage, where, to establish an *alibi*, he said he had passed the night. His mother's original denial and eventual confirmation of his story were also difficult to explain. A great point in his favour was that, having received a pardon, he challenged a second trial, though this raised a doubt whether in case of a second conviction that pardon would hold good. The court thought it necessary to consult General André on this point, and the reply was in the negative. The opinion turned out to be unnecessary, for the prisoner was acquitted on the 2d inst. by five votes to two.

A JOINT committee of the Louisiana Legislature visited the State penal farms for the purpose of reporting on the work done by the Board of Control. The members of the committee spent some time talking with the negro convicts, and presently one of the negroes recognized a member of the committee, who is a rising young lawyer, not a thousand miles from New Iberia.

"You know Mr. B—?" inquired one of them.

"Yaas, sah, I knows Mr. B— well. He's de one dun sent me heah," replied the darky, with a grin spread all over his face.

The man had not heard of Mr. B— officiating as a prosecuting attorney, and wanted to know how he came to send the convict there.

"He wuz mah lawyer, sah." — *New Orleans Picayune*.

It is necessary — writes an English correspondent — for a junior counsel to apply to the Lord Chancellor to recommend him to the King to be made a King's Counsel. The Lord Chancellor notifies all those who are appointed and their names appear in the papers. But before they can take their seat in the front row it is necessary to be called "within the bar" by the judges. And a day is appointed for this. Until they are so called within they cannot take their seat in the front row. The following incident occurred on the first day of term, April 8, 1902:

The learned Judge sat in the King's Bench Division to hear commercial causes. In the course of the day he observed Mr. Montague Lush, who has recently been created a King's Counsel, but who has not yet been called within the bar, sitting among the junior counsel immediately behind Mr. Danckwerts, K. C. Addressing the new "silk," the learned Judge said:

"Have you not been sworn in yet, Mr. Lush?"

Mr. Lush: "No, my Lord."

Mr. Justice Bigham: "I was wondering why you had taken refuge behind Mr. Danckwerts."

Mr. Danckwerts: "I beg your Lordship's pardon."

Mr. Bigham: "I was only addressing Mr. Lush."

Mr. Danckwerts: "Oh, I thought you were asking my learned friend, Mr. Lush, whether he had been sworn at yet" (laughter).

Mr. Justice Bigham: "Oh, no" (renewed laughter).

# LITERARY NOTES.

THERE is material enough in *The Conqueror*<sup>1</sup> for a number of novels and several historical essays, but the novels would suit the author's style better than the history. In fact, the most interesting and best written parts of the book deal with the imaginary events and almost unknown people. Life in the West Indies, where Alexander Hamilton, the hero of the book, was born, is most vividly pictured. Hamilton, as a son and father, is ideally lovable and real. Ideal, too, was his love for his wife, even though marred by his friendship for Mrs. St. Croix, whose intellectual help was invaluable to him and whose revenge influenced Burr to demand the fatal duel. Certainly, as the title sets forth, it is a romantic story, and one that gives a vivid personality to one of the brilliant heroes of the Revolution.

THE story<sup>2</sup> of the experiences of a young American newspaper correspondent and a beautiful but unscrupulous young woman, "the power behind the throne," during a week's revolution to a South American republic recalls to one Richard Harding Davis's *Soldiers of Fortune*. The book is dramatic, and the characters are capitally drawn, more by their deeds than their words. Events crowd so that neither actor nor reader has time for analysis. The chivalrous care which this young American gives to a woman who appeals to him only because of her sex and danger, seems as much a matter of course as her sudden change of affection from the cowardly President of the Republic to the unsuccessful popular leader with whom she bravely dies. On the whole, this strikes us as one of the most readable short novels that has appeared recently.

THE literary world scarcely needed another historical novel, but *Dorothy Vernon of Haddon Hall*<sup>3</sup> introduces us to still more historical personages, who lived and loved in the days of "good Queen Bess." Elizabeth herself, and the beautiful, ill-fated Mary, Queen of Scots, both play

<sup>1</sup> THE CONQUEROR. Being the true and romantic history of Alexander Hamilton. By Gertrude Franklin Atherton. New York: The Macmillan Company. 1902. (xiv + 545 pp.)

<sup>2</sup> THE LATE RETURNING. By Margery Williams. New York: The Macmillan Company. 1902. (pp. 205).

<sup>3</sup> DOROTHY VERNON OF HADDON HALL. By Charles Major. Illustrated. New York: The Macmillan Company. 1902. (367 pp.)

important roles. But the heroine is the beautiful, wilful daughter of a headstrong, vulgar, old nobleman. Oaths, vulgarity, uncontrolled passions are given undue importance in the effort to paint the society of those times truly, and one can scarcely agree with the author's insistence on the heroine's true womanliness, for many of her escapades and speeches show quite opposite characteristics.

It is quite evident that the story has been written with a view to dramatization. There are a number of scenes well adapted for such a purpose.

UPLAND GAME BIRDS. By *Edwyn Sandys* and *T. S. Van Dyke*. Illustrated. New York: The Macmillan Company. 1902. (vii + 429 pp.)

This is the second volume in the "American Sportsman's Library," edited by Caspar Whitney, which, judged by the excellence of the volume before us, deserves a place on bookshelves of the lover of sport and outdoor life. Mr. Sandys writes, from wide personal knowledge and experience, concerning the quail, partridge, grouse, ptarmigan, wild turkey, woodcock and plover; Mr. Van Dyke treats of the quail and the grouse of the Pacific Coast.

Both the full-page pictures of the various upland game birds, and the description in the text of each variety, are excellent; while stories of the field, the woods, the meadow and the camp, with which its pages are laden, make the book interesting reading even for the reader who lays no claim to the title of sportsman.

#### NEW LAW BOOKS.

STUDIES IN JURIDICAL LAW. By *Horace E. Smith*, LL.D. Chicago: T. H. Flood and Company. 1902. (xxvi + 359 pp.)

The title of this volume leads one to expect a somewhat more important contribution to legal literature than the book itself proves to be. In fact, the author's purpose is simply to set before the general reader and before the student who has made a hurried study of the law with a view to admission to the bar at the earliest possible moment, the cardinal principles of govern-

ment and law, a knowledge of which, the author rightly believes, is essential to a liberal education and to good citizenship under a republican form of government. The book fulfills this purpose.

Supplementing the main part of the volume are two papers, now reprinted; one upon the Plea of Insanity, and the other upon Literary Property.

THE HIGHWAY LAW OF THE STATE OF NEW YORK. Containing all Laws relating to Highways as Amended to the Close of the Legislative Session of 1902. With Annotations, Forms and Cross References. By *H. Noyes Greene*. Second Edition. By *L. L. Boyce*. Albany, N. Y.: Matthew Bender. 1902. (xxxviii + 471 pp.)

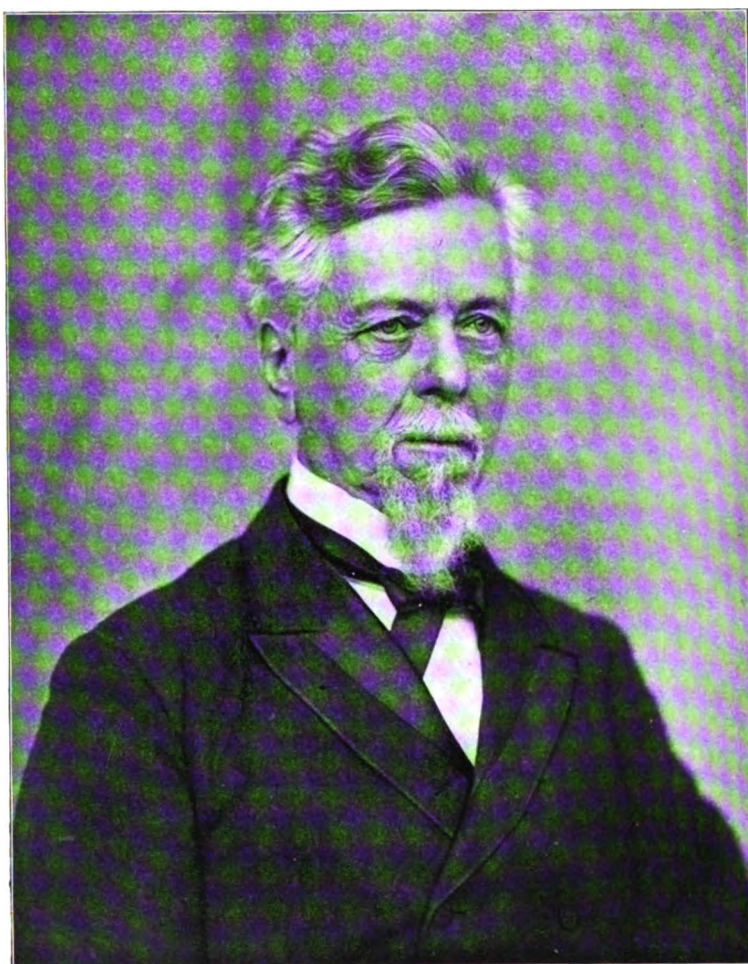
This volume, which brings the New York highway laws down to date, is of especial value to county, town and village officials. It treats in a satisfactory way the "Highway Law," chapter nineteen of the General Laws, which deals with the powers and duties of highway officers and overseers of highways; highway labor and assessment therefor; laying out, altering and discontinuing highways and laying out private roads; bridges; ferries; and county supervision of highways. Separate chapters cover the "good-roads" laws, the grade-crossing laws, and the sidepath laws, — these last of so recent date that only one case under them has been reported.

THE ELEMENTS OF THE LAW OF SALES OF PERSONAL PROPERTY. By *Wm. L. Burdick*, Ph.D., LL.B. Chicago: T. H. Flood and Company. 1901. (xi + 214 pp.)

Professor Burdick has, in this volume, given the law student an excellent presentation of the elements of the law of sales of personal property. It makes no pretense of being an exhaustive study of the subject; but it sets forth clearly and concisely the essential principles under the law of sales.

We are glad to note that the author emphasizes the importance of case-reading; he cites under each paragraph of the text a few leading cases, selected with a view of covering the whole subject, when read in connection with the text.





JOHN W. CARY.

# The Green Bag.

---

VOL. XIV. No. II.

BOSTON.

NOVEMBER, 1902.

---

## JOHN W. CARY: A GREAT CORPORATION LAWYER.

By DUANE MOWRY.

THE lawyer, as such, has little enduring fame. Even the admittedly great advocate rarely finds a permanent place on the pages of history. This is so because a lawyer's labors, however prodigious, usually relate to matters of passing interest only. They rarely enter into, or concern, what we call history. But it does not follow, nor is it true, that the lawyer is the intellectual or moral inferior of his contemporaries. Indeed, it is not egotism to say that the mental and moral fiber of the average lawyer is often superior to that of men whose names have found recognition in history. And yet we know that the professional work of a great lawyer, demanding the highest order of intellect, requiring the closest and most persistent mental application, calling for the keenest insight into the motives and actions of men, utilizing learning in its most diversified forms, does not and cannot command the admiration and respect of the generations which are to follow. The lawyer's best monument is the conscious knowledge of having served his client honestly, faithfully, and to the utmost of his ability, and to have contributed his proper part in assisting in the due administration of the law in the halls of justice. The contemporary fame of such a lawyer is always secure, no matter what may be the verdict of posterity.

John Watson Cary builded such a monument. For nearly half a century he served his clients well, and his professional brethren,

of both the bench and bar, bear ample evidence of his absolute sincerity of purpose, lofty professional ideals, untiring industry, and great legal ability. In the particular branch of corporation law, and particularly of that part of it applicable to the great railroad systems of this country, he is believed to have had no superior during his time. Certainly, this is praise of no mean order.

The subject of this paper was born in Shoreham, Vermont, February 11, 1817; he died in Chicago, Illinois, March 29, 1895. He was born on a New England farm and continued a member of his father's family at Shoreham until he was fourteen years of age. In 1831 the family removed to the state of New York and settled on a farm. After his father's removal young Cary found employment in a country store, but the work was distasteful to him. He returned to the farm, and, an opportunity being offered him to advance his educational attainments, he seized it greedily, and for a time, attended a private academy at Hannibal. It was at this time that he determined to engage in the practice of the law, and he at once set himself diligently at work to prepare for college. He provided the means necessary to defray the expenses of a college course, working on a farm and teaching until 1837, for that purpose. He was graduated from Union College in 1842. He began the study of the law during the last year of his college course, with Samuel W. Jones, of Schenectady, and



completed his law studies in the office of George Rathbun, of Auburn. He was admitted to the bar of the Supreme Court at Albany by Judge Nelson in January, 1844, and was made a solicitor in chancery at Saratoga, by Chancellor Walworth, soon after. In February, 1844, Mr. Cary opened a law office in Red Creek, Wayne County, New York, where he lived until 1850. In the latter-named year he removed to Racine, Wisconsin, and continued in the practice of the law there till 1859. His first law partner was the late Judge J. R. Doolittle, afterwards United States senator from Wisconsin. Judge Doolittle withdrew from the partnership in 1853, at which time he was elected a circuit judge. Mr. Cary became a member of the Milwaukee bar in 1859, and continued as such until 1890, when the removal of the general offices of the Chicago, Milwaukee and St. Paul Railway Company from the Wisconsin metropolis to Chicago, caused Mr. Cary to move also, he being at that time at the head of the legal department of that corporation. He continued to make Chicago his residence thereafter until his death in 1895.

It was during Mr. Cary's residence in Racine that his legal ability began to attract attention and awaken interest. And while his rise in professional reputation was rapid and should be denominated eminently respectable, it had not yet reached that stage where it could be said to have been conspicuous. He was a young lawyer of fair parts and with a promising future. He appears to have had the confidence of the community and was elected to the State senate and served his constituents in that body in 1853 and 1854. In 1857 he was mayor of the city of Racine. Mr. Cary's first case in the Supreme Court of Wisconsin, the State court of last resort, was argued in 1853, while he was a member of the Racine bar. It is the

case of *Hutchinson et al. v. McClellan*, and is found in the 2 Wis. 17. Questions of practice are passed upon by the Court adversely to the interests of Mr. Cary's client. It was the opposing counsel, however, who was the moving party in the higher court.

While Mr. Cary was laying well the foundations for the eminent lawyer which he afterwards became, it was not until after his location in Milwaukee that he was identified with important litigated and financial interests, out of which we have the great railroad corporation lawyer of the Northwest. His was the master spirit, during the formative period of its life, which made possible the present splendid railroad system operated by the Chicago, Milwaukee and St. Paul Railway Company, its various lines now aggregating over six thousand miles, and its capital stock amounting to nearly seventy-five millions of dollars. In his manipulation of the affairs of this corporation, of the legal department of which he was in charge from its organization in 1863, until his death in 1895, he was more than the mere lawyer; he was the business man of wonderful constructive ability as well.

The case of the Chicago, Milwaukee and St. Paul Railway Company against the Railroad and Warehouse Commission of the State of Minnesota was an important bit of litigation, not only to the parties directly concerned, but to transportation companies generally. It was known as "The Milk Rate Case," and involved the question whether the legislature of a State, acting either by positive law or through a commission, can prescribe rates of freight to a common carrier by railway which are not fair, reasonable or compensatory, less even than the cost of transportation, and then compel the carrier by *mandamus* to perform the carriage at the rates so fixed and prescribed. The case was decided against the Railway

Company in the Supreme Court of Minnesota, but was won by it on a writ of error in the United States Supreme Court. The case was decided March 24, 1890, and is found in 134 U. S. 418.

The "Act to regulate common carriers, and creating the Railroad and Warehouse Commission of the State of Minnesota, and defining the duties of such commission in relation to common carriers," enacted by the State Legislature and approved March 7, 1887, was copied mainly from the act of Congress establishing the Interstate Commerce Commission, but contained in addition to the provisions of that act, this provision: "That in case the commission shall at any time find that any part of the tariffs of rates, fares, charges or classifications so filed and published as hereinbefore provided, are in any respect unequal or unreasonable, it shall have the power and is hereby authorized and directed to compel any common carrier to change the same and adopt such rate, fare, charge or classification as said commission shall declare to be equal and reasonable"; and making it "unlawful for such common carrier to charge or maintain a higher or lower rate, fare, charge or classification than that so fixed and published by said commission," and subjecting common carriers to legal processes and penalties for failure to comply with the recommendation of the commission. It was under the provision quoted that the most interesting question in the above case against the Railroad and Warehouse Commission arose.

Although the orders of the commission could only be enforced on application to the Court, and, upon the hearing, the Court had jurisdiction to examine the whole matter in controversy, including matters of fact as well as questions of law, and to alter, affirm or rescind such order in whole or in part, as justice might require, nevertheless the Min-

nesota Supreme Court held that the orders of the commission made in pursuance of the subdivision above quoted were not subject to review by it. The language used by it is certainly remarkable for a State court of last resort. It says:

"It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the legislature is that the rates recommended and published by the commission (assuming that they have proceeded in the manner pointed out by the act) should be not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission. Indeed, the language of the act is so plain on that point that argument can add nothing to its force. . . Subdivisions (e) and (f), . . and so much of subdivision (g) of the same section as relates to compelling compliance with the schedules recommended by the commission, are entirely new, not being found in the act of Congress. The incorporation of this new matter must have been for a purpose, and that purpose clearly was to clothe the commission with full power to determine, in each particular case, what were equal and reasonable rates, and to make their determination on that question final and conclusive."

This admission by the Court that the de-

termination of a body, at most but *quasi*-judicial, and the creature of the legislature, is final and conclusive, is a new doctrine which will hardly find general acceptance; is not a safe policy; is neither good reason or good law; and courts and lawyers do not generally believe that the right of review by the courts can be constitutionally so abrogated.

Mr. Cary's brief before the Supreme Court of the United States is a masterly presentation of his side of the case, and an illuminating disquisition on the legal propositions involved. The case was decided for Mr. Cary's client because the Court below held that the findings of the commission were conclusive and not open to review by judicial investigation; that the act was in conflict with the Constitution of the United States, in depriving the company of its property without due process of law, and depriving it, also, of the equal protection of the laws.

The language of Mr. Justice Blatchford in part, in giving the opinion for the majority of the Court, is significant and worthy to be quoted:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon

their invested capital, the company is deprived of the equal protection of the laws."

Mr. Cary's connection with the celebrated granger cases, so called, was also conspicuous. They arose on statutes passed in Illinois in 1873, and in Wisconsin, Iowa and Minnesota in 1874. The Wisconsin and Iowa statutes fixed a maximum tariff. The Illinois and Minnesota statutes provided that commissioners should make schedules which should be *prima facie* reasonable rates. They are reported in the 94 U. S. 155 to 187.

Mr. Cary contended before the State Supreme Court in the Wisconsin case instituted under the granger statute (35 Wis. 426) that so far as it attempted to fix the rates of compensation to be charged by the company for the transportation of freight and passengers, it is void, because it interferes with the rights of property, in contravention of the constitution of the State and of article 5 of the amendments to the federal constitution. The right to control one's property and fix the price for its use is an attribute of ownership, and the right to determine the compensation for which one will render his personal services and incur risks in transacting the business of another is a personal right necessary to freedom. A pretended law which ignores these rights is unconstitutional and void. The shareholders are the absolute owners of the railroad and of all of the property of the company. This act takes the property by depriving the owners of the beneficial use and enjoyment of it. The only value of a railroad to its owners is the right to operate it so as to make what is commonly known as net earnings. By operating this road in accordance with the scale of prices fixed by the company itself in 1873, the total net revenue applicable to interest and dividends is less than thirty per cent. of the gross earnings. This act fixes the rates nearly thirty *per cent.* below those rates, so that, if it is complied

with the same amount of business done by the company during the past year will yield no net income. And as the net income or revenue constitutes the sole profit and measure of value of the road, it is plain that if the act is sustained, and retained as the permanent policy of the State, the value of the road is destroyed and lost both to the bond and stockholder. It is plain, therefore, that the law not only takes but confiscates the property of the company. The right to regulate charges cannot be sustained because the State has empowered the company to exercise the right of eminent domain. The right may be conferred on an individual as well as upon a corporation. It cannot be maintained on the ground that such road is a public highway. A railroad is a highway in a certain sense, but not in the ordinary sense of the word. It is a great thoroughfare, but not open to the public, nor owned by the State, nor in any manner controlled, managed or used as are common highways. The legislature treats it as property, not as common highways. It is subject to taxation. While corporate franchises may be said to be a species of property, and are of value, they are entirely distinct from what is ordinarily understood by property of the corporation or of the shareholders. No modification or repeal of the corporate franchises under which corporators have purchased and hold property, can impair any estate or vested right of the corporators in such property. The State cannot recall any more rights or privileges than it has granted. A railroad may be operated by an individual as well as by a corporation, and charge for transportation of freight and passengers, without interference or control of the government, except that charges must be reasonable. The constitutional reservation gives the legislature no power to interfere with such property, or to prescribe the compensation to be made for

its use. This reserved power only gives the legislature power to alter such things as are contained in the charter, and there is nothing to alter in the company's charter, as to rates. The power to amend is not reserved, but the power to alter; and an alteration must be of something already in the charter.

Numerous other questions were presented on both sides of this interesting case by the eminent counsel employed. The Wisconsin Court held, however, that as to the rights claimed under the charter, the reserved power in the Constitution of the State authorized the action of the legislature.

Mr. Cary was a member of the Committee on Judicial and Remedial Procedure of the American Bar Association in 1890 and 1891. He was a member of the minority of that committee and prepared the report of the same submitting objections to the proposed change in our jury system then under consideration. This report is a strong presentation of the arguments in favor of retaining the jury system unimpaired by any changes whatever. It shows Mr. Cary to have been the wise conservative lawyer, always opposed to changes of doubtful expediency. This report is deserving of wide reading and general circulation. A few excerpts are given :

"All change is not reform. It is the duty of this Association closely to scrutinize and examine all important changes proposed in the methods of our jurisprudence, and earnestly inquire whether the change is in reality a reform, and one that would improve the course of remedial justice, or an unwise and reckless removal of important landmarks established by the wisdom of our fathers. . . . We firmly believe that our people would never be satisfied that their most important rights and interests should be finally fixed and disposed of by a *part* of a jury, empanelled to hear and decide the facts in a given controversy, and have no doubt that the entire abolition

of the whole system is preferable to a change that would allow a majority of seven, or nine even, to exercise all the powers and functions of the entire twelve. . . . Trials by jury became a part of the common law when the questions before the courts related principally to real estate and personal rights and liberty, and while admirably fitted to ascertain and settle the few and simple facts generally involved in such controversies, it by no means follows that a jury of twelve men, farmers and mechanics, are the most appropriate tribunal to which the facts and circumstances connected with intricate and involved commercial transactions of the present day, could be submitted for an intelligent and satisfactory decision. A change in that respect might be in the direction of true reform, and warranted by the changed condition of the circumstances and business of the commercial world, and the advance of civilization. Notwithstanding this may be true, we cannot look upon the proposed change with any degree of favor. . . . In an active and extensive practice of nearly half a century in three States, it has not been the experience of one of the minority of your committee to observe mis-trials to any serious extent, caused by "one crank" or "fool" on the jury failing to agree with his associates. Cases of this kind may have occurred; but mis-trials have usually been the result of honest differences of opinion of jurors. . . . Jurors were never selected as experts, or as men learned in the law, but as men competent to find and agree upon the facts, and their unanimous concurrence has always been required. If the unanimity principle is to be given up and sacrificed, then the whole jury system should go with it. If a majority is to rule in fixing the verdict, let us have men of intelligence selected for the purpose, learned in the law and skilled in the investigation and sifting of evidence, and their number greatly

reduced. In fact, let the whole system be abolished, if this one essential and fundamental principle is to be eliminated, and a different tribunal constituted."

Three of the committee signed the majority report. One concurred in Mr. Cary's minority report. The whole question was the subject of discussion by the Association. But the Association hesitated, and passed the further consideration of the subject over to the next meeting of the organization. The report of the minority, coming as it did from such an eminent source, caused the Association "to take a second thought" before taking definite and final action. It is doubtful if anything further ever came of the matter before that august body.

It is obvious from what has been submitted, that Mr. Cary was identified with litigation of far-reaching importance and consequence, not only to the parties directly concerned, but to the general public as well; that this importance and consequence related, not only to the vast financial interests involved, but also to legal principles as they should be applied to corporate interests, and their proper judicial interpretation in the courts of last resort. Mr. Cary's connection with this litigation was in the capacity of one of the principal actors. He took no minor part. He was the leading counsel on one side of the litigated matters. His familiarity with the facts and knowledge of the law was phenomenal. The presentation of his views, as they had been formed, by reason of that familiarity and knowledge, was masterly. He was cautious but certain. He was conservative and fair, but never wavered. He was painstaking and thorough and so never hesitated in the positions taken. He was modest and unostentatious and so never "brilliant," as the term is used among lawyers. He abhorred the lawyer who indulged in senseless claptrap and meaningless hulla-

baloo before the courts. He had a dislike for the mere time-server. Yet he was optimistic in his thoughts and life, rather than pessimistic.

The trend of his thoughts was along serious lines. He was sincere and candid, but not eloquent. He had a matter-of-fact way of going at things, methodical and untiring in his labors, and relied more on careful research and preparation, for his legal victories, than on the inspiration of the moment. But opposing counsel rarely surprised him. His "habit" of being prepared admirably fitted him for the wise, safe and careful counselor which he always proved to be. A great corporation and the conservative business public prefer such a lawyer to mere spread-eagleism or "brilliancy." The latter are not safe counsel and have little influence before a court of thoughtful judges. And it is, after all, before the courts of last resort, before the bench of eminent judges, where the final and full measure of the truly great lawyer is taken. It was before such courts, both state and federal, that Mr. Cary passed for his real value. He was sincere and honest with the courts. He was a true officer of them. He did not mislead them. He attempted to assist them in arriving at correct conclusions, and, therefore, at just judgments. In the honest exercise of the judicial function, courts appreciate such assistance, for, like the rest of humanity, the courts are but fallible at best. Nevertheless, they welcome the lawyer of Mr. Cary's quality, for his candor, his legal ability and his professional poise. He was

more than a mere workman, serving his employer; he was a master builder of that legal structure which is to serve as a guide and an inspiration for generations which are yet to enter this noblest of professions.

But Mr. Cary was more than an eminent lawyer, counsel for vast corporate interests. He was a good citizen and a public-spirited man. He served his Milwaukee constituents in the common council of the city and was a member of the assembly in 1872. He was also the Democratic candidate for Congress, and received the complimentary vote of his party for United States Senator. Although not a conspicuous public man, as that term is usually understood, he never failed in the performance of his public duty as a citizen, and he took a lively and intelligent interest in local public affairs. But it was not his ambition to be the idol of the rabble. His thoughts and feelings would revolt at the doubtful honor.

It has been suggested that it is, perhaps, too soon after his death to place an exact estimate of Mr. Cary's position among the eminent lawyers of this country. His proper place is, undoubtedly, among the great corporation attorneys of the Northwest. This seems to be conceded. If these lawyers are as eminent as elsewhere, then he is the peer of the best of his class. They *are* as eminent. It is our belief that the ultimate judgment of his contemporaries will place Mr. Cary as the great corporation lawyer of the Northwest without a superior in this particular branch of the law during his time in this country.



## THE COAL MINES AND THE LAW.

By BRUCE WYMAN.

ON the morning of the day on which this review was written the newspapers had the good news that the great coal strike was ended by the submission by both operators and miners of the whole controversy to the arbitration of the board appointed by the President of the United States. To those of us who had asserted against hope that this time of straits was, like other stringencies in the market, a temporary stoppage, the outcome must seem peculiarly happy. For to many of us the situation had seemed most dangerous in the possibility that some attempt might be made by some violent process of law to wrest the mines from their owners; that in the then exasperation some court might be found to wrench the law out of its regular course and award some extraordinary remedy. Therefore those of us who maintained that there must be no overturn of private rights, even in so trying an exigency, feel a great relief in this settlement without any resort to the courts by any of the three parties in interest: the miners, the operators, or the public.

The author of the pamphlet<sup>1</sup> under review was one of the most militant of those who demanded that the mines be opened by legal process, because it seemed to him that in no other way could a situation which was intolerable be brought to an end (p. 38). In the first weeks after its publication this essay made a great stir, so forcible was its advice; the newspapers took up its cause, so popular was its appeal; even lawyers discussed it with heat, so fundamental were the issues it raised. Now that the crisis to

which it had application is past, perhaps the time has come when it may be reviewed with calmer judgment.

Any discussion of the foundations of our industrial relations must begin with *Munn v. Illinois*, 94 U. S. 113. The General Assembly of Illinois passed a statute in 1871 which provided a maximum charge for the storage of grain in public elevators. The firm of Munn & Scott refused to obey this act; therefore they were fined; thereupon they appealed from court to court, until the Supreme Court of the United States confirmed the decisions against them. What was laid down in that case is with us the basis of all public duties and all private rights: "Looking then to the Common Law, from whence came the right which the Constitution protects, we find that when private property is affected with a public interest, it ceases to be *jus privati*. . . . Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use he must submit to the control" (p. 20). It is not too much to say that no more important decision than this has ever been made by the Supreme Court of the United States; for upon the right understanding of this case depends the true conception of our general theory of the place of the State.

Yet the sweeping principles laid down in

<sup>1</sup> THE COAL MINES AND THE PUBLIC. By Heman W. Chaplin. Boston and New York. J. B. Millet Company. 1902, pp. 63.

*Munn v. Illinois* must be employed with the greatest caution. The distinction involved in that case between the public calling — the exception — and the private calling — the rule — is one of most consequence. This distinction, unfortunately, is obscured at the outset in this pamphlet by the propounding of the doctrine that the ownership of any property is not absolute; since "All real estate of whatever character is subject to the right of the public in many respects to restrict the use of it, or to require affirmative action in respect to it on the part of the owner" (p. 12). It is true as an abstraction that absolute property rights cannot exist in organized society; and yet by comparison with the qualified rights in public employment the rights guaranteed in private business seem complete.

Two cases may illustrate this difference at common law. In the first, a traveller knocks at the door of an inn; the landlord orders him to be gone; that is so grave a violation of public duty that it is a crime — *Rex v. Ivens*, 7 C. & P. 213. In the second, an undertaker refuses to sell a coffin because the customer is already indebted to him; that is within his private right, to refuse any one — *Brewster v. Miller*, 101 Ky. 275. These are first principles.

The same distinction is found of importance in the determination of the constitutionality or unconstitutionality of statutes. Thus in an early case it is admitted that the power of eminent domain can be granted for a water-works, since this is a public object — *Lumbard v. Stearns*, 4 Cush. 60. Whilst in a later case it is held that the power cannot be given such an enterprise as a private railway — In the matter of the Niagara Railway, 108 N. Y. 375. It is, again, the same principle which leads the courts to allow the use of public funds to operate a municipal gas-works, a public purpose — *State v. Toledo*, 48 Oh. St. 112; but forbids taxation to aid

in the construction of a sawmill, a private object — *Allen v. Jay*, 60 Me. 124. In every instance it will be seen the decision turns upon public calling or private calling.

An enlargement of this class of public utilities, upon which much stress is laid throughout in this pamphlet, is by proposing invitation of the public as the test (p. 12-13): "Whoever so conducts his property or his business as to enter into relations with the public, and leads them to depend upon his services and the use of his property, thenceforth holds his property and his services no longer as private property, but subject to a superior and dominating interest in the public, that is to say, holds them in trust for the public, and subject to public control." Such is the proposition as elaborated. This again confuses the issue.

If profession to serve the public be the test, how must this case be decided upon demurrer: A doctor holds himself out to serve every one in his town; he is sent for to attend a man stricken with violent illness; he refuses to go; and it is alleged that thereby the man died without any fault of his whatever? The decision is that all this sets forth no cause of action, for notwithstanding the public profession, this is recognized as a private calling — *Hurley v. Huddingfield*, 156 Ind. 416. In the same way, consider the case of the department store; there the public are solicited by every wile to come, and yet clearly when it comes to a determination whether this be public calling or private calling, it must be held private calling, else all businesses would be drawn into the net — *Chicago v. Netcher*, 183 Ill. 104. One other case — an establishment for pressing cotton in Galveston which is accustomed to serve all customers that apply, makes a schedule with an extra arbitrary charge; but that is held to be within its rights, since it is a private business, however important it may



be proved — *Ladd v. Cotton Press*, 53 Tex. 172. In this same way must fail every attempt to enforce public duties in respect to the operation of a private business, although those that conduct it may have held themselves out to serve the public. No man can of himself make his business public or private in its nature. Profession does not make public calling; the law does that.

It seems, then, that the case which Mr. Chaplin makes for the public against the coal operators would have been more fair in its presentation if it had been squarely stated that the issue was whether the business of the mining of coal was public calling or private calling. As the law stands, whatever form of remedy be sought the whole case must stand or fall by the decision upon that issue; for if the business be public calling, then the coal companies may be compelled by appropriate remedies to serve all that apply with adequate facilities for reasonable compensation and without discrimination; whilst if the business be private calling the owners may refuse all, provide what supply it pleases them, charge their own price, make any terms; and in so doing stand upon their legal rights, however much thereby they may defy public opinion. Argument is needed to establish the premise, exposition only to the conclusion set forth.

For upon all these principal points the law governing public service is recognized, if the public calling be shown. To use one of Mr. Chaplin's best examples, the obligation of a public service company goes even to this extent, that if the employees of a railroad quit work, such a strike furnishes no justification to the railroad for a failure to run. *Mandamus* should be granted, nevertheless. *People v. New York Central*, 28 Hun. 543. When you find an electric light company with its wires along the streets, you may be sure that they must make proper connections with

your house if you make proper application, because this is a public calling — *Gould v. Electric Light Co.*, 60 N. Y. Supp. 559. By the same principle, the railroad bridge company at Niagara cannot stand off in its dealing with the railroads and charge any price; since this is a public utility it may make only reasonable rates — *Canada Railway v. International Bridge Company*, 8 App. Cas. 723. Nor can a water company lay its pipes through a street in a city and then declare that they will supply water to applicants above Fourteenth Street, but that they will refuse all applications from below Fourteenth Street; as these are public works, all applicants must be taken — *Haugen v. Albina Water Company*, 21 Ore. 111.

Not only, then, upon these principal points is the law settled, but in many instances the details are worked out, so that what the wrongs are in public calling it is well established; and, what is of more importance in case of need, what remedies are appropriate it is well known. For example, nothing is more usual than the use of *mandamus* to compel the performance of its duties by a public service company, as Mr. Chaplin points out (pp. 48-51). The only issue, again, is, therefore, whether the coal mines are in public calling or not. For if this be a public calling there can be no doubt of the obligation to provide a supply to all that apply, no hesitation on the award of a prompt remedy.

It is along these lines, then, that any criticism of Mr. Chaplin's position that the mines may be opened by legal process must proceed. Already many examples have come up of the sort of business that is held to be public; perhaps it would be well to add more, in order that a clearer understanding of the conditions may be had. The telephone, for instance; why has that been put down as a public employment from the day of its introduction by every court upon

common law principles alone without the aid of statute? Because the position is such in that business that any other position would be intolerable. Whenever an exchange is established, a new applicant can get the service in any usual community in two ways, either by being taken on by the telephone company or by stringing separate wires from his own store to every other place of business in the city, in the state, in the country. Such an alternative as that puts the applicant completely within the power of the telephone company, unless it is recognized that the law will compel the service, if the company refuse to perform it — *State v. Telephone Co.*, 17 Neb. 126. Take again the case of sewerage service. In the same way, unless a householder is let into the system at a proportionate rate, he must in the usual case construct drains for himself miles in length through private lands. Obviously, then, the corporation that has such control of the situation as that must be held to be a public concern, so that they cannot stipulate to provide service only upon their own terms, — as in one case that an applicant must have water from them as well as sewerage, by providing that the price shall be the same for sewerage alone as for water and sewerage — *Mobile v. Water Supply Co.*, 130 Ala. 379. Another late example is the irrigation canal company which builds a reservoir at the head of a stream to appropriate the water and constructs a system of canals and ditches to distribute the water to farmers far down the valley. In such case the farmer who applies must get from them or have none at all; and accordingly the holding must be to prevent such oppression that these are public works — *Wheeler v. Irrigation Co.*, 10 Col. 582. One other example, the log driving company which has an exclusive right to drive all logs down a certain stream; unless such a company takes

the logs of every owner who presents them, those owners cannot get their logs to market without legal wrong except overland. Clearly, in such case, it is not possible that the court can fail to point out the consequence, that an obligation has been assumed commensurate with the privilege — *Weymouth v. Log Driving Co.*, 71 Me. 29. It will be seen that the state of things is similar in all of these cases — a situation which could not be left without law; otherwise a disruption of the industrial order would impend.

That condition of affairs may be summed up in the single phrase, that Mr. Chaplin uses — virtual monopoly (p. 26). Indeed, it is competition that characterizes by its presence private calling, for it is by that law that private business is regulated. We may be sure in the most of the trades that we will get prompt service, that we will be furnished adequate facilities, that we will be charged fair prices, and that we will get about the same treatment as any one else; because free competition will produce all that; and therefore no coercive law is necessary. Now in the exceptional cases where there is a monopoly, competition by the definition is absent; and therefore the law must step in to regulate, else there will be injustice, oppression, overcharge and discrimination. The recognition of this latter class of callings has been slow because it involved a departure from that theory of free competition upon which the present industrial organization depends; but surely this reluctance was unintelligent; for clearly it is no inconsistency to abandon a general policy in a situation where it is inapplicable.

A review of the instances that have been cited will show that the conception of virtual monopoly will cover everything. Nothing narrower will do, as for example the difference sometimes put forward between an undertaking of a public service in distinction to

the furnishing of a public supply. Now, it is true that most of the instances are cases of service, the railroad and the tram, for example; but other of the cases are of supply, the water-works and gas-works, for example. Indeed, as Mr. Chaplin points out, there is nothing in that distinction either in economics or in law (advance sheets of his second edition). Neither will any broader idea than virtual monopoly do for a test, as the claim put forward in this pamphlet that whenever there is a public need the business becomes affected with a public interest (*supra*). In truth the application of such a test would take in almost all private businesses, for almost all industries in a sense supply to the public some necessity or other. The inquiry therefore should be confined to an examination into monopoly. *Munn v. Illinois*, we see, is thus limited to public callings. And whether virtual monopoly or virtual competition be found should determine whether public calling or private calling is established.

At this stage of the argument it is well to examine into the present case more closely, (pp. 1-9). The material facts as commonly understood are as follows: The mines within the anthracite coal region are owned by a comparatively limited number of corporations and individuals; more than that, there exists a present concert amongst the great corporations, owners in the district, which are united by leases, by voting pools, and by other devices to preserve community of interest; it is even current belief that this combination is centred in a holding company which meets a certain day each week, and certainly it has been apparent during the last year that this confederacy has a present control of the market. If all this be granted, does not this make out the case against the coal operators, for is not this showing of virtual monopolization conclusive demonstration that the coal mines are devoted to a public use?

It would seem so on the face of things; and yet objections to that consequence present themselves at once. We are so used to see a corner made one day and the market break the next, to witness a pool formed in one month disappear in the next, to find a close combination in control in one year and a fierce competition in the next, that we do not attach much importance to such ephemeral monopolies; rather we look upon them as a natural course of things in all industries, this integration and disintegration. We cannot think, therefore, of trading in wheat as public business one day and private the next, of the sale of rubber as private calling in one month, public business the next, of the supply of whiskey as private business one year, public calling the next; the law of the public services as we know it is not subject to such flux and reflux. You have a hotel in a city of ten thousand public houses, still it is public calling, despite the competition — *Lamond v. Gordon Hotels*, 1897, 1 Q. B. 541. So if you find a single grocery store in a town, that does not make that store in public calling, despite its monopoly — *Brewster v. Miller*, 101 Ky. 275. In truth, that is not a legal state of things, to have a business shifted into public calling upon a temporary crisis, and shifted out again, the stringency being over. The law deals rather with conditions wherein the control is established in the nature of things, so that unless the law unlocks the supply it will be withheld forever to the permanent detriment of the public, when you may say: It is settled now — we are convinced that there can never be effective competition in this business. Of that nature every calling that has been held public will be found upon examination into the real facts of the matter.

It is at this point at last that the elaborate case against the coal operators seems to break down. By long experience it is known

that this pool, like all efforts to control a market in vendibles, will break up sooner or later from the convulsion of inner forces. Therefore the courts will not put so suspicious a case in the class of public callings; and by that decision list the business of mining of coal as public calling for all future cases everywhere, forever. This tract was an outcry in time of hardship; at such a time, more than at any other, desperate remedies are proposed. To open the mines by any legal processes whatever, as that business now stands, would be to override private rights as they are established in our system.

Fortunately, under our constitutions, any

attempt to subject private property to public operation must fail. Our theory of State in this regard must never be broken in upon. There are enterprises into which our governments may go; there are businesses which none of our governments may presume to conduct; between the public calling and the private calling there is this great gulf fixed. It is impossible for any one who would appeal to the authorities to operate the mines in any industrial crisis to disclaim the result of his argument (p. 37). The consequence of a decision that all business is subject to public operation in any way that temporary expediency might dictate would be socialism.

## ANCIENT REFLECTED THROUGH MODERN.

By J. B. MACKENZIE.

### I

**A**CROSS the line, a culprit misnamed Good  
Trusted a plea he filed would muster pass;  
That growths ought never to be understood  
As *hay* when such were *cultivated* grass.  
The Court much pained him by its curt address:  
"You cannot here win quittance for this wrong —  
The fine escape true judgment did assess —  
By pretexts which to fraudulence belong."<sup>1</sup>

### II

When marching last through Gaul, Rome's powerful Goth  
Felt it incumbent on him to ordain  
(Breach of the mandate to unvail his wrath)  
That each from loose marauding should abstain.  
Came one who guilt denied in seizing hay,  
As being *grass* — in terms reserved alone;  
The sophism, alack, did little weigh,  
Since for the crime his life had to atone.<sup>2</sup>

<sup>1</sup> Regina v. Good, 17 Ontario Reports, 725; where it was contended by the defendant, moving to quash a summary conviction, made under the authority of a statute, which prohibited the removal of hay from an Indian Reserve without a license, that *natural* grass only was meant. The Court, however, decided that the term included the artificial product.

<sup>2</sup> "On their way, the army passed through the territory owned by the Monastery of St. Martin of Tours, the greatest saint of Gaul. Here the King commanded them religiously to abstain from all depredations, taking only grass for their horses and water from the streams. One of the soldiers, finding a quantity of hay in the possession of a peasant, took it from him, arguing that hay was grass, and so came within the permitted exception. He was at once, however, cut down by the sword, the king exclaiming, 'What hope shall we have of victory if we offend the blessed Martin?'" — Hodgkin's *Life of the Emperor Theodore*.

## THE AMERICAN BASTILLE.

BY GEORGE F. ORMSBY.

THE British Articles of War of 1765, "in force at the beginning of our Revolutionary War," provided in sec. 15, art. 17, 18, and 19: "To the end that offenders may be brought to justice, we hereby direct that whenever any officer or soldier shall commit a crime deserving punishment, he shall . . . be put in arrest . . . or imprisoned till he shall be either tried by a court-martial or shall be lawfully discharged by a proper authority. No officer or soldier who shall be put in arrest or imprisonment shall continue in his confinement more than eight days, or till such time as a court-martial can be conveniently assembled. No . . . guard . . . shall refuse to receive or keep any prisoner committed . . . by any officer . . . which officer shall, *at the same time, deliver an account in writing, signed by himself, of the crime with which said prisoner is charged.*" (Winthrop's Military Law (1896), Vol. 2, pp. 1465, 1466.)

The present naval articles 24 and 43, sec. 1624 R. S. read: "No commander shall inflict . . . arrest or confinement . . . longer than ten days, unless a further period is necessary to bring the offender to trial by a court-martial. The person *accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest*; and no other charges than those so furnished shall be urged against him at the trial."

The near identity of these British and American views as to fair dealing, the ancient origin of the present naval law, are obvious. Moreover, the British idea may be traced continuously, embodied in the "Massachusetts Articles" of April 5, 1775, in the "American Articles" of June 30, 1775, of

September 20, 1776, and of May 31, 1786, for the Army. (Winthrop, Mil. Law (1896), pp. 1475, 1483, 1500, 1506.) The stringent naval law first appeared in the Act of April 23, 1800. After this the next Army Articles, of 1806, made the duty of furnishing charges more imperative by (art. 80) having the requirement to "keep a prisoner" to depend on "*provided the officer committing shall, at the same time, deliver an account in writing, of the crime charged*;" and by adding (art. 82) that "every officer to whose charge prisoners shall be committed, shall, within twenty-four hours after such commitment, *make report in writing of their crimes, on penalty,*" etc. Thus there was no arrest without the reason therefor, "charges," furnished to the accused or placed within his reach.

Recently some seamen in the navy brought suit to vacate court-martial sentences pronounced against them, on the ground that their trials were forbidden by this art. 43, sec. 1624 R. S. Investigation revealed the practice of furnishing only officers a copy of the charges upon which naval prisoners are held in jeopardy of perhaps death, while seamen may be confined for many months, ignorant of any precise accusation, with no written voucher in their possession to guard against alterations in the charges, beyond reach of writ of *habeas corpus*, with no assured right to counsel, and liable, when wholly or partly innocent, to surprise, loss of witnesses, mistaken convictions (the prosecutor's evidence being alone secretly preserved under charges known only to the prosecutor), and imprisonment, still helpless victims, in the penitentiary, shut off even there by naval rule from any one who might aid them. (Navy Reg. of 1896, arts. 1039, 1034-1038, 1778. Compare Doc.

164, Senate, 56th Cong., 1st Sess., with Albany Law Journal for September, 1902, pp. 331-333.)

In explanation of his course the Navy's Judge Advocate General has written that he has believed that the statutory rule aforesaid meant to provide for two successive arrests: "first, an arrest upon the discovery of the alleged wrong-doing; second, an arrest for trial," — the second being the arrest of a person already in jail, when the jailor saw fit to tell him why he was there. Then, and only then, was "an account in writing of the crime charged" to be "furnished." (Navy Department's letter to the Attorney-General, No. 2282-02.) This Bastille, with its queer second arrest, has been denounced in the recent case of *Smith v. United States*, 36 Ct. of Cl. 304, and in *Stephen Harrington v. United States*, No. 21024 in that Court (unpublished). (N. Y. Maritime Register of April 30 and July 23, 1902.)

There is an exception to this art. 43 which emphasizes how wanton this false imprisonment has been. When the Congressman who penned the original act of 1800 had got as far as "the person accused shall be furnished with the charges at the time he is put under arrest and no other than those so furnished him shall be urged against him at the trial," it occurred to that member of the Naval Committee that the "arrest" of the "person accused" might be long before other vessels of the fleet and the flag-ship could be reached and a trial ordered (art. 38, sec. 1624 R. S.), and that therefore the prisoner might be guilty of some "new" offense in the meanwhile. So the framer of the law authorized a "new charge" which, said the exception, must be limited to facts theretofore unknown, or un-evidenced and uncredited. Not only must this be furnished while it was "new," but a "reasonable time" must elapse before it was tried. And who was to decide whether this

was in good faith a "new charge"? If left to the "person demanding the court" (generally the man-of-war's captain) there would be no check on his disposition to conceal his negligence. Hence it "must appear to the court" that the statute was obeyed, and that the court had jurisdiction. Whether the court had jurisdiction in other respects depended on facts transpiring in the court's presence. While the other articles merely implied that "it must appear to the court" that they were proceeding legally, art. 43 expressly drew their attention to its imperative requirement. In *Smith v. United States*, *ubi supra*, is told how the long Bastille-like arrest of General Stone, in 1862, by Secretary of War Stanton, led Congress to amend the naval act of 1800 so as to include the Secretary of the Navy within its provisions, an Attorney-General having theretofore decided that the restrictions of art. 43 only rested on subordinates. The American Bastille is then an edifice of the Executive and not of Congress.

This *lettre de cachet* system applies only to the "laboring-men" of the navy. This is testified to in the Navy Regulations of 1900, art. 1078, which reads: "Whenever an accusation is made against an *officer*, either by report or by endorsement upon a communication, a copy of such report or endorsement shall be furnished at the time to the *officer accused*." That a report which contains the charges and specifications on which a lowly seaman is arrested, should be furnished him with equal promptness, is obvious. "While very large liberty and opportunity are given to officers to prepare for trial, seamen are confined in cells six feet long and three and a half feet broad; and while officers may be intelligently quick to understand the charges against them, illiterate sailors are slow to grasp the exact situation; and the greater their ignorance the more they need a

written memorandum to dwell upon and to have their friends and fellows look at and advise them about," before perishable or forgettable evidence of innocence is lost. 36 Ct. Cl. 315. The nation's safety is gravely menaced in the growing difficulty to get good and intelligent fighters to enlist in its naval defense. Since a charge and the prosecutor's evidence are alone known and preserved, since the "process of law" there substantially excludes defense,—the word of a commander is sufficient to send to the penitentiary or to

death. Such a service cannot be trusted by the intelligent and the efficient, and the United States must be gradually losing their support. As the regulation above mentioned affirms the necessity of furnishing accusations even to officers to guard them against wrongful injury, what must be the fate of many a helpless, humble, illiterate seaman, and what must be the reputation which he spreads among the seafaring population on which this country must rely in the unexpected crises of war?

### THE SYSTEM OF MEZZADRIA.

NOWHERE is the right of the landlord enforced more stringently, or do the customs allowed him remain more strongly colored with feudalism, than in Italy, where the *Mezzadria* so largely prevails, and is so imbedded in the national habit that no other land system would be tolerated in the country generally, and Tuscany in especial.

The peasant, in law styled *colono parziario*, in common parlance *contadino*, is supposed by the journalists of the English press to be a part proprietor of the soil, and to have inalienable rights thereto. In point of fact, the *colono* is only a tenant paying in work instead of money, and dismissible at will at any pleasure of his master, the dismissal being only subject to the law thus far, that it must be given at the close of the agrarian year (November), and must allow a year's warning or notice.

The contract between landlord and tenant is defined by Marosini as "one bilaberal; in which the one side accords the soil to be cultivated, and the other is obliged to cultivate it for a quarter of its proceeds." But in this contract there is nothing which prejudices or in any way weakens the landlord's right

to the soil, or confers on the tenant anything more than a passing or partial possession of it. The peasant, entering upon the farm he has engaged to cultivate, is bound by the law to furnish: first *bestiame*,—that is, all animals needful for agricultural labor, and in sufficient number, to provide manure sufficient for the soil; second, all instruments and objects needful for cultivation or production; such as forks, spades, wagons, spinning-wheels, ox-carts, and to maintain all these in due order; third, one-half the seed necessary for sowing,—this last is an innovation under the new Code, or *Patria Codice*; fourth, all expenses needful for the cultivation of the fields and the harvesting of its produce: when he requires a helper he must pay for one. As well as this, he must make any necessary plantations, keep clear all ditches, drains, and water springs; must fetch and carry all materials for repairs, and take what is required to his master's house, and, what is still more curious, must execute all work ordered by his commune on the public roads adjacent to him. These are his obligations: in return he has a right to one-half of the produce of the soil; but the mulberry leaves

belong to the landlord alone, as do the woods, with the exception of such wood as the *colono* may need for fuel, for vine-stakes, or any other farm purpose; in the woods he may pasture his animals, but must not sell any wood or dispose of dead wood without his *padrone's* permission: neither can he cut the grain or gather the grapes or the olives until his *padrone* gives permission and indicates the date.

It will be seen, therefore, that the position of the peasant under the laws of *Mezzadria* is by no means one of liberty; still less does it resemble in any way a semi-proprietor's hold on the land. He has no hold whatever, and is subject to dismissal at any moment; then, though he must receive notice from November to November, he cannot work upon the farm after March; when he has found a new farm he must live on the old and go and labor on the new from March to November. When the old and the new farms lie far apart, this of course entails great additional fatigue upon him. The *colono* in his own household is master; his sons and daughters, other relatives, perhaps, and his *garzone*, or helper, are all obedient to and dependent on him, but each has a right to an enjoyment in the proceeds of the common labor, except the *garzone*, if there be one, who is paid and fed. In turn, the *massaio*, or *cappocia*, as the head of the house is called, is subject to the landlord even in matters of domestic interest, and there are unwritten laws between them which are as binding as any in the Code. No one of the sons can marry without the landlord's permission; and, what is harder, must marry whether he wish it or no, if the landlord thinks any other woman is wanted in the farm. This seemingly intolerable interference with personal freedom is submitted to quite meekly, so great is the force of habit. The sons, indeed, are under great subjection,

both before the law and by the force of habit; for if the head of the family be in all things subject to his master, so is no less the son to the father. By the supreme decision of the High Court of Florence in 1868, it was finally decided that the son could not be even the associate (*socio*) of the father, but must ever remain under the paternal jurisdiction and authority; and that the son is legally bound to help the sire affectionately in all labors agricultural, and must be content to receive from his progenitor nutriment and support without even demanding account of the fruit of his work. The famous lawyer Bandi laid down as law, that to recognize any equality as associates (*soci*) between father and son was to lessen all paternal authority, introduce the spirit of speculation, which would swiftly destroy the spirit of affection, and would put an end to that harmony which alone renders the family moral and happy.

The father of the family has a dominion quite absolute over all those forming his household. No appeal against his orders or arrangements is allowed. He on his part is bound always to keep in view the general good, always to act as becomes a *padre de famiglia*, and always to compel each to perform his or her due portion of labor without favor or hindrance. On the other hand, as I have shown, the *padrone*, as the landlord is called in common parlance, has great and severe powers over the *massaio* and his household; and although the law decrees that he shall not molest vexatiously and needlessly his *contadini*, yet the law allows him all right to control and direct the manner of agriculture, because, as it is expressly said, the owner has a perpetual interest, and the cultivator only a temporal one, in the land. This is precisely the view of property in land which is so much disputed in these days, but which has never been contested in



this, the oldest of the agricultural countries of Europe. The right of the proprietor is protected in every way by the law, and it is considered that the master of the soil is the natural person to ordain the treatment that the soil shall receive. Of such liberty as the tenants now clamor for in England, not to say Ireland, nothing is known or recognized in the *Patria Codice*. The right of the landowner passes before all others. Even, as I have shown, a considerable exercise of what in other countries would be considered as tyranny, is allowed to him in consideration that (the soil belonging to himself) he will be injured irrevocably if it be dealt with ill. This is surely a juster view than that taken by the modern method of sacrificing the landlord *in toto* to his tenants and their interests.

Whether the *mezzadria* be a system under which the landlord really obtains all he might out of his estates is another question. Italians are wedded to it for the most part, and Tuscans will not contemplate the possibility of any other mode of culture. When, as in times past, the peasant families dwelt on the same lands for many centuries, and affectionate and feudal ties connected the *massaio* with the *padrone*, the results of the system were no doubt very much more bene-

ficial to both than they are now, when the *contadini* are constantly changed, like any other servants, and in lieu of any personal attachment have only a keen interest to guide them. Even upon estates where the *coloni* remain unchanged, the whole system is poisoned by a third factor, of which the law takes no cognizance save when it says that the agent of the landlord is to be accounted as equal in the right to direct and order with the landlord himself. This third factor is the *fattore*, or bailiff. It is not too much to say that this intermediary is the curse of the rural communities and the cause of most of the ruin that befalls Italian nobles and gentlemen. All the powers that the law accords to the landlord he delegates to his steward. By law the master is the person who is to keep all accounts of debit and credit between himself and his peasantry, all record of work done and of value received. Actually, of course, these are kept by the *fattore*, who, residing close to the farms (for if a landlord has several estates he has several *fattori*), is always on the spot to see what is done and what is spent or made. The indolence and amiability of Italian gentlemen have combined to let entire power slip into the hands of these agents or bailiffs.



THE BARRISTER'S SHAKESPEARE.

SUPREME COURT OF VENICE, PART WATER, BEFORE HON. THE DUKE, C.J.

Percy Algernon Shylock, *Plaintiff*

*against*

Antonio W. Smith, *Defendant*

DEFENDANT'S ANSWER.

The defendant, by his attorney, Portia Hennessy, answering the complaint of the plaintiff herein, deposes and says:

I. That the quality of mercy is not strained, nor any part nor parcel thereof in any manner, way or shape whatsoever.

II. That he denies having called the aforesaid plaintiff "cut-throat" and "dog" upon Wednesday *ult.*, and that he did not "spit upon his Jewish gaberdine."

III. In respect to the matters set forth in paragraph II., the defendant alleges that the plaintiff's proper remedy is either in assault or libel, and that the allegations thereof contained in plaintiff's complaint should be stricken out as irrelevant and scandalous.

III. The defendant admits that he borrowed the sum of three thousand ducats from the plaintiff.

IV. The defendant alleges that in payment of the aforesaid debt, he offered one (1) ounce of anthracite of far greater value than the sum aforesaid, or than one (1) pound of flesh, said flesh being fatty and not having hung for any length of time; and he further alleges that the plaintiff refused said offer and demanded his bond.

V. The defendant further alleges that the plaintiff is not a nice man anyway.

*Wherefore*, the defendant demands that judgment be rendered for him, together with the costs of this action and the right to marry his attorney to his friend, and half of the goods of the plaintiff, and any other relief that the court may decide upon as just, provided there be anything else left to grant.

BELMONT COUNTY \$ \$

Portia Hennessy, being duly sworn, deposes and says that she is the attorney of the defendant in this action, that she has read the foregoing answer and knows it to be true except as to those parts alleged to be on information and belief, and as to those parts she has a strong hunch it is true. The means of her information is the necessity for Act IV. The reasons why this verification is made by her and not by the defendant is because he is a dope and a fat-head and hasn't sense enough to do it himself.

P. HENNESSY.

Sworn at before me this Ides of March,

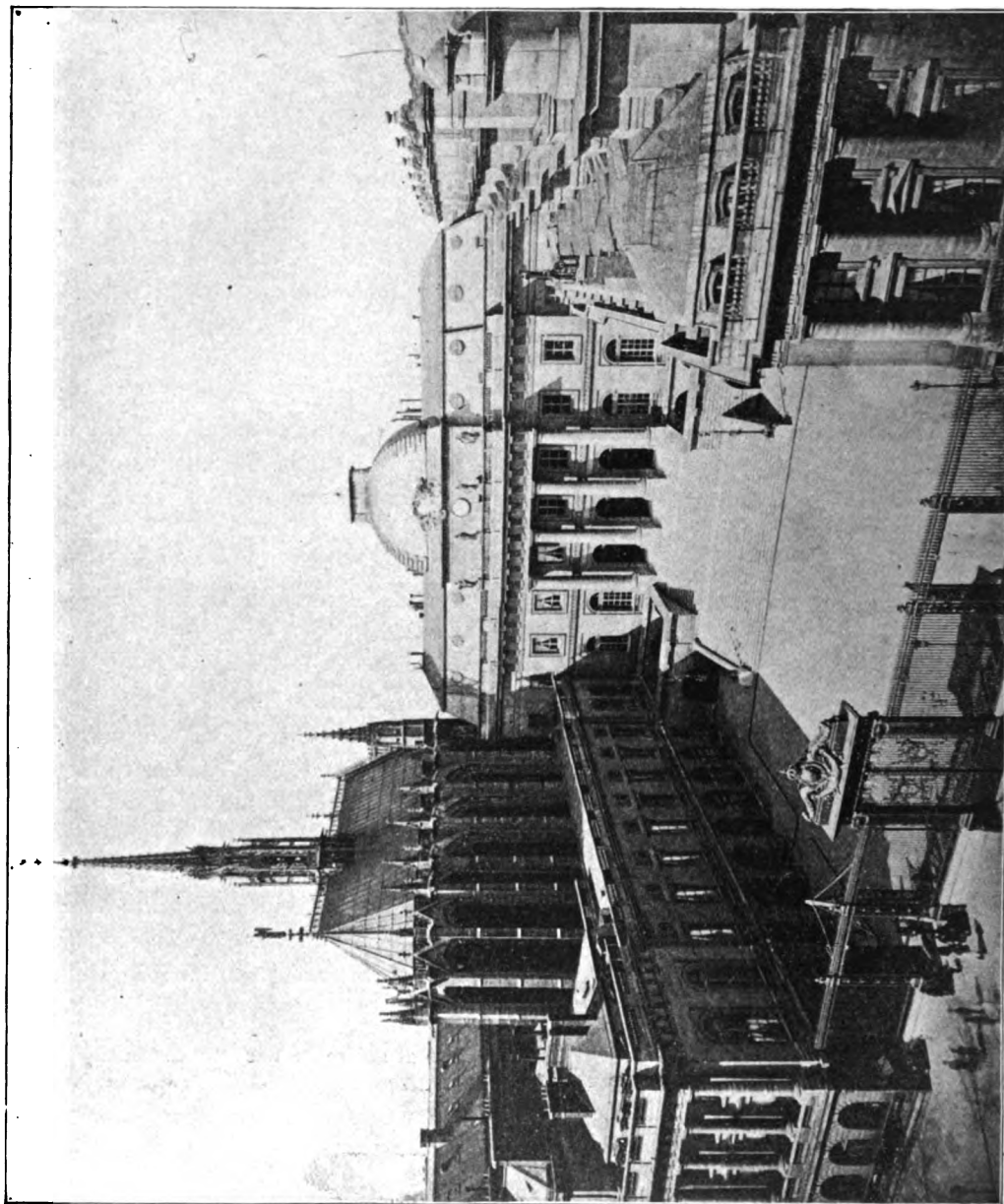
1342 ½ A. D.

MACBETH MACREADY MACCULLOUGH,

[Ye Seal.]

*Notforthe Public.*





LE PALAIS DE JUSTICE, PARIS.

## THE JUDICIAL SYSTEM OF FRANCE.

BY LAWRENCE IRWELL.

FRANCE is a country in which the number of judges is large, but it is not a country in which justice is dispensed in an ideal manner. The numerous and varied jurisdictions existing there are not all of ancient origin, for some of them are not yet a hundred years old. When the men who were responsible for the Great Revolution succeeded in getting into power, they attempted to rebuild on novel principles the judicial edifice which they had upset, and they quickly put order in place of the chaos that existed at the time. Impromptu courts were no longer held in the streets, but even after the repeal of the *loi des suspects* there were still some special tribunals in existence. It was necessary to rearrange the scattered elements of the old judicial system and the new, to reconstitute the legal organizations, invest them with authority, define their powers, and surround them with the prestige that attaches to a brilliant staff of judges. This could not be done in a month, and before the work was completed more than one of the principles laid down by the Revolution had disappeared. Some of them are still being sought for, and this laborious and barren search revives from time to time some well-known liberty-killing ideas.

The present judicial system of France dates back to 1790. In that year a law was passed establishing a civil court in each district, and judges for every court were elected. The law provided a justice for each canton (sub-division of a district), and abolished the supreme courts which had previously possessed appellate powers. The right to hear appeals was entrusted to the district courts, and they exercised it one towards another. The administration of justice in criminal cases was, a

little later, given a special form in the criminal courts of the *départements*. Lastly, above all other jurisdictions, civil and commercial, there was placed a Supreme Court, the Court of Cassation. This somewhat complicated system did not last very long. It was replaced by another which proved but little more lasting. In February, 1800, however, a law was passed which laid down the permanent lines of the judicial institutions, and fixed the limits of the various jurisdictions. The courts of the *justices de paix*, the commercial courts, the criminal courts, and the Court of Cassation were all maintained. A civil court of first instance was allotted to each district, and there were created some thirty higher courts, which have successively been called "Imperial Courts," "Royal Courts," and "Courts of Appeal." In addition to these various tribunals, several others have been brought into existence. I propose to give a short summary of the whole institution and the limits of the various jurisdictions.

The civil judicature comprises, beginning at the top, — (1) the Court of Cassation; (2) the Courts of Appeal; (3) the Assize or Criminal Courts; (4) the Tribunals of First Instance; (5) The Commercial Courts; (6) the Maritime Courts, appeals from which are heard by the Court of Appeal; (7) the Peace Courts; (8) the Councils of Experts, instituted under the Second Empire to adjust disputes between employers and employees. This is not all, for we must add what is called the "administrative" judicature, which is composed of *Conseils de Préfecture*, as courts of first instance, and the *Conseil d'Etat* as supreme and appeal court. These deal with the differences that arise between private individuals and the State with regard to State

or local taxation, irregularities committed by government officials, and similar acts. They are therefore a somewhat original kind of tribunal, in which the State is both judge and party to the action. In the United States — or in England — no such courts would be possible. Administrative treatises and various commentaries declare that this system is necessary in France, and they strive at great length to prove what they assert. They ought to add that any system more calculated to operate unfairly could not be devised. These courts seldom decide a case upon its merits, and they do not appear specially anxious to get at the facts. (Evidence of this assertion could easily be furnished.)

Alongside these civil and administrative jurisdictions there is another, closely allied to the former. I refer to the machinery for dealing with criminal cases. I propose to pass over this branch of the subject, although I think it desirable to throw occasionally some light upon the manner in which this machinery works. What tells against a satisfactory administration of justice in France is that every accused person is looked upon as guilty. This wrong tendency is not the result of intentional ill-will upon the part of anybody, but is the consequence of a badly ordered judicial system.

There are two other jurisdictions to be mentioned — the military and the naval. Both of these have a military character. They were long considered worthy of esteem, respect, and even admiration. One must have attended a sitting of a court-martial before which a soldier is brought for a proved and confessed crime in order to get an idea of the extreme care with which the proceedings are conducted. Everything that can strengthen the defense is heard with the greatest attention, and when sentence is passed, it is difficult not to be moved by the way in which it is done. Military law is hard, as everybody knows ;

the cruel word *death* is found in it very frequently ; but at the fatal moment, the president's voice, so steady on parade, trembles and falters in a way that shows what it costs him to pronounce the sentence that is to banish a member of the family. Harsh as military law is, it seems less so than civil law. The private soldier is tried by officers, but the court also comprises a man belonging to the ranks, and it is he who speaks first when the time arrives to decide the fate of the accused. As a matter of fact, military executions are uncommon in France. For about a dozen years there appears to be no record of a single one having taken place, the death sentence having always been commuted. Proposals to relax the rigors of military law, and even to abolish courts-martial, have often been made. It is always pleasant to see a severe law made less so, but there is a difference between amendment and repeal. Possibly the day may come when courts-martial will be dispensed with in time of peace — not only in France, but in English-speaking countries.

At present, there are in France about three thousand two hundred and sixty civil courts, not including the commercial courts, the judges of which are unpaid, or the councils of experts. To this number must be added one court of appeal, sixteen courts of first instance, and one hundred and two courts (*justices de paix*) in Algeria, making altogether three thousand three hundred and seventy-nine tribunals for dispensing justice. I might also add the police courts which exist in each district, whose powers are confined, as they are elsewhere, to punishing trivial offenses. Disregarding these and the peace courts, which are little more than conciliation courts, or courts dealing with little disputes about boundaries, and matters of a similar character, and which are incompetent in cases involving more than three hundred

francs, we find that there are some four hundred and five courts sitting regularly and forming the actual judicial body. The num-

ber, whose post is a high one. Besides these sixty-one regular judges, there are a number of substitutes, who await their turn



PRESIDENT OF COURT OF APPEAL.

ber of judges employed is as follows:—a few provincial tribunals have only three; others have five, and some still more, distributed among several courts. Thus, at Paris there are forty-eight judges, composing nine courts, twelve vice-presidents and one presi-

dent, whose post is a high one. Besides these sixty-one regular judges, there are a number of substitutes, who await their turn to become full judges. The inquiring judges (*juges d'instruction*) are twenty-two in number.

This completes the list of judges. They have as a part of their courts the public prosecutor, and thirty-nine deputies. At

Paris alone, there are sixty-one judges to hear and decide cases, twenty-two who examine, and thirty-one whose duty it is to demand conviction or acquittal in the name of the law. The number for all France, the capital and Algeria included, is three hundred and seventy-five presiding justices, sixty-five vice-presidents, four hundred and eleven examining judges, and six hundred and eighty-seven ordinary judges. The *magistrature débout* numbers three hundred and seventy-five public prosecutors and two hundred and ninety-eight assistants.

The twenty-six appeal courts of France and the court at Algiers give employment to twenty-seven chief justices, sixty-three presiding judges, or vice-presidents, twenty-seven public prosecutors, sixty-one attorneys-general, sixty assistants, and four hundred and fifty counsellors. Above the courts of appeal, the name of which indicates their attributions, there is the Court of Cassation, with its high and somewhat hazy duties of interpreter of the laws. This court sits at Paris, on the perilous borders of politics. The appeal courts and the Court of Cassation form what is termed the *haute magistrature*.

Criminal cases are not dealt with in France by a distinct body of judges, as in some other countries. The question of guilt or innocence is submitted to a jury, the same as in the United States and England. The presiding judge at assizes is always a counsellor of the appeal court of the district; he is accompanied by two assessors, who are also counsellors if the assizes are held in the town where the appeal court sits, but who can be chosen from among the judges of first instance if they are held in some other place. The names of the judges are drawn by lot from lists compiled beforehand by the public prosecutor and the chief justice. Although the rights of the accused are not as well pro-

tected as they are in the United States and in England, they are nevertheless well enough protected to leave scope for the exercise of leniency when deserved. In fact, certain juries have carried indulgence to such a point as to arouse public opinion. Most of the cases known as *crimes passionnels* — that is to say, crimes arising from that one of the passions which most deeply stirs man's heart once it springs up therein — usually result in an acquittal, to the distress of the rigidly virtuous judge, but to the delight of many Frenchmen. Moreover, legislation has considerably relaxed the precautions formerly taken to ensure the conviction of the guilty. The judge's charge, for example, which was often a veritable speech for the prosecution, instead of being, as the law intended, an impartial review of the case, for and against, has been abolished, and its pernicious effect is no longer felt. The cause of justice has, beyond doubt, gained thereby.

It is difficult to see why three judges should be required for passing sentence after the jury has given a verdict. The law, by its numerous and subtle distinctions, has made this duty very simple. I do not believe it possible that a good judge can seriously err in preforming this task, and it would seem, therefore, that the two assessors have been given him in order to guard against slips and oversights. Criminal procedure is so full of pitfalls that perhaps three heads are not too many for this purpose. The Court of Cassation is always on the lookout, and does not always require a good reason for quashing a sentence regularly passed and based on solid ground.

The Court of Cassation has only a limited staff. There is a chief justice and a public prosecutor, who are on an equal footing, three presiding judges, forty-five counsellors, and six attorneys-general. All of them receive higher salaries than the judges of other courts.

They sit in a splendid court, decorated by the best modern painters. When they demand it, they have a guard of picked soldiers. They

sacred walls have almost the weight of law, despite the fact that they are often contradictory. According to circumstances, the



PROCUREUR-GÉNÉRAL.

are dressed in red gowns and ermine mantles. All of them try to appear dignified, and the majority of them are most serious. The advocates who plead before them form a body apart from the rest of the bar, and in jurisdiction the decrees rendered within those

public opinion of the moment, or the vicissitudes of politics, decisions contradict each other, and the name this court bears invests it with the necessary authority to quash its own decisions.

As has been mentioned already, the num-



ber of judges in France is very large, even if the three thousand justices of the peace and a still larger body of deputy-justices are omitted. Counting the subaltern employees, it forms a veritable army corps that hold the country at its discretion. It even numbers, in its secondary ranks, officers who can at their will imprison people and bring them by devious ways to ruin and dishonor. It is possible for an enquiring judge, once put in charge of a case by the public prosecutor, to have an innocent person — an entire stranger to the affair — arrested and kept in solitary confinement, if he believed — or even wished to believe — that the person had been concerned in it. A personal enemy, or simply a suspected man, can be arrested and locked up. In some cases, when this occurs, it is simply the result of excessive zeal upon the part of an official. It is true, however, that the examination of an accused person must be made in the presence of the counsel for the accused — if he has one. But this supposed safeguard, copied from England, is more apparent than real, because the counsel is usually obliged to sit still and keep his mouth closed. There is room for many improvements in the judicial system of France. Complaint is made, as it is in other countries, that legal proceedings are too slow and too costly. It is written in the law of France that justice is done without expense to the litigants, but this is entirely false. On the contrary, it is very expensive. If we search for the reason of this, we find that the State makes it a source of revenue in various ways — stamps, registration fees, *etc.* There are officials who expect to be paid for the honor of their signatures. At every step in the formalities, civil or criminal, there is a tax to pay. You have no right to receive payment from a debtor for what he owes you until you have settled, *for him*, the costs in which he has been mulcted. The treasury is obliged to recover

by some process the money it pays out for judges' salaries! There are more than three thousand senior officers and more than ten thousand subalterns, corporals and privates, in this army of functionaries who look to the State for their pay. The Court of Cassation does not cost less than \$285,000 each year. The Courts of Appeal cost about \$1,500,000 *per annum*. The tribunals of first instance require \$23,000,000 each year. The criminal courts require \$1,500,000 every year. None of these figures includes the maintenance of court buildings. Making a total, justice is administered in France and Algeria at a cost of not less than six million dollars (twenty-four million francs) *per annum*. If one did not know what a large number of judges are paid out of the amount, one might suppose that a judge was highly paid. This is not the case. When a French judge has no private means, he is in anything but a good position financially. The salaries of judges in France are small. They are certainly not paid as they ought to be. But this remark is equally applicable to the judges of the Supreme Court of the United States. All over the world a judge is supposed to be a man of unimpeachable integrity, learned, even erudite, in the law, conscientious to an extreme degree, impartial, endowed with exceptional perspicacity, loyal to the truth, inaccessible to popular clamor, and beyond the reach of political influences. Such a man ought not to be subjected to the anxieties of making both ends meet, nor left in uncertainty as to what the future may have in store for him and his family. By an Act passed in 1814, judges were made irremovable, and they are therefore sure of holding their positions. There was also the dignity of the position, as in those days it was not easy for any man who coveted a position to get elevated to the bench. Every man chosen did not fulfil the ideal I have tried to sketch,

but for a great many years the judicial body retained a high character. The upheavals that came later on shook the institution, no doubt, but the revolutionists were careful not to throw it down. In the future French judges may, perhaps, be placed so far beyond the reach of improper influences that they cannot fall. Instead of the poorly paid thousands the country now has, a few hundred would suffice. The idea of having single judges in the trial courts, as in the Great

Republic and in England, is gaining ground. It is seen to be a means of eliminating a number of mediocrities, of letting in only men of great talent, and of making the judge strong enough and independent enough to soar above the level of the agitated community, and hold the balance evenly between small and great, weak and strong, iniquity and right. The cause of justice would be infinitely better served than it is at present.

---

### WAS A GOOD WITNESS HIMSELF.

BY JONAS JUTTON.

**M**ANY amusing incidents are products of the court-room, but generally the most humorous come from the magistrates' courts. This is often owing to the ignorance of the justice, and frequently he innocently does that which brings censure upon his head. This was well illustrated in a West Tennessee court, the presiding officer being old 'Squire Makepeace.

A citizen of the town in which the afore-said 'Squire held the scales of justice brought suit against what was then the N. N. and M. V. Railroad Company, but which is now the Illinois Central, for damages for a fine mare that had been killed by one of the company's trains. A young lawyer, who now stands at the head of his profession, but who at the time of the trial had just been admitted to the bar, was counsel for the plaintiff, a Mr. Bean. The complainant's attorney proved conclusively that the mare was killed, and also proved by a number of witnesses that she was worth one hundred and seventy-five

dollars; but he never produced any proof to show that the animal was killed by the N. N. and M. V. Company's train. The town is at a crossing of the above-mentioned road and the Mobile and Ohio, and when the company's attorney got up he called the attention of the magistrate to the fact that no proof had been adduced to show that his company was responsible for the death of the mare. Then the railroad lawyer nearly had his breath taken away by the magistrate who rose, and said, animatedly:

"Well, by gum, I happen to know myself, that your road killed the mare, and I award Mr. Bean one hundred and seventy-five dollars."

The company had offered to compromise by paying the owner of the animal one hundred dollars, which he would have been wise to have accepted, for the company carried the case through several courts, and though Bean got one hundred and seventy-five dollars for his mare, nearly all of it went to his lawyers.

## LANDMARKS OF CHINESE LAW.

## II.

BY VINCENT VAN MARTER BEEDE.

THE Shu King, or Book of Historical Documents, the most ancient of Chinese classical books, relates to the period beginning about B.C. 2357. Kao-Yao was Minister of Crime to Shun, and is still celebrated as a Solomon among judges. Shun began to rule B. C. 2255. The following conversation between him and Kao-Yao was written in perhaps 1100:

Kao-Yao said, "Oh! there are in all nine virtues to be discovered in conduct, and when we say that a man possesses any virtue, that is as much as to say he does such and such things." Yu asked, "What are the main virtues?" Kao-Yao replied, "Affability combined with dignity; mildness combined with firmness; bluntness combined with respectfulness; aptness for government combined with reverent caution; docility combined with boldness; straightforwardness combined with gentleness; an easy negligence combined with discrimination; boldness combined with sincerity; and valor combined with righteousness. When these qualities are displayed, and that continuously, have we not the good officer? When there is a daily display of three of these virtues, their possessor could early and late regulate and brighten the clan of which he was made chief. When there is a daily severe and reverent cultivation of six of them, their possessor could brilliantly conduct the affairs of the State with which he was invested. When such men are all received and advanced, the possessors of those nine virtues will be employed in the public service. The men of a thousand and men of a hundred will be in their offices; the various ministers will emulate one another; all the officers will

accomplish their duties at the proper times, observant of the five seasons, as the several elements predominate in them,—and thus their various duties will be fully accomplished. Let not the Son of Heaven set to the holders of States the example of indolence or dissoluteness. Let him be wary and fearful, remembering that in one day or two days may occur ten thousand springs of things. Let him not have his various officers cumberers of their places. The work is Heaven's; men must act for it!"

"The Punitive Expedition of Yin" is another "speech" of the great Shu. In the reign of Khung Khang, a brother of Thai Khang, the fourth of the kings of Shang, B. C. 2159–2147, the Marquis Yin exhorted his troops as follows:

"Every year, in the first month of spring, the herald, with his wooden-tongued bell, goes along the roads, proclaiming, 'Ye officers able to instruct, be prepared with your admonitions. Ye workmen engaged in mechanical affairs, remonstrate on the subjects of your employments. If any of you do not attend with respect to this requirement, the country has regular punishments for you.'"

It may be of interest at this point, before describing the Chinese court, to quote from "the earliest *detailed* account" of China in the English language, by the Padre Juan Gonzalez de Mendoza, translated out of Spanish by R. Parke in 1588:

"All these iustices generally haue a maruellous morall vertue, and that is, they be all very patient in hearing any complaynt, although it be declared with choller and

<sup>1</sup> Translation of James Legge, in *Sacred Books of the East*.

proude speech. It is the first thing that is taught them in their schools; they are very well nurtured and courteous in their speeches although it be with them that they have condemned by law."

Mendoza's description of Chinese legal procedure is most entertaining. The Hakluyt Society of London has taken the pains to reprint this rare book.

The Ta-li Sz', or Court of Judicature, controls all the criminal courts in the Empire, and may fairly be called the Supreme Court. In trials for murder it unites with the Court of Representation and Censorate. Judges who are not unanimous must report to the Emperor. The Ta-li Sz' is held in the highest honor throughout China.

Justice is to be had at all hours of the day and night, although courts are supposed to be open only from sunrise to noon. A drum stands ready for suppliants to beat at the doors of inferior tribunals and the Court of Representation in Peking; but this means of attracting attention is little used. Six tablets at the gate of the Governor-General's palace set forth the principal wrongs which a person is likely to suffer.

The magistrate enters court accompanied by a retinue of lictors. Men bearing the symbolic whip and chains are preceded by gong-strikers whose raps are according to the rank of their master. A pair of avant-couriers shout: "Clear the way!" a servant carries the *lo*, or umbrella of state, and an assistant runs by the side of the sedan. The secretary and messengers are in ordinary chairs or on foot. The highest officers are carried by eight, the lowest by two bearers. Other insignia are lanterns by night, red tablets by day. In Peking, mandarins have mounted attendants and ride in carts, but there the effect is purposely subdued out of deference to the Emperor.

Inside the always plain and dirty court

room the magistrate seats himself at a table, whereon are the official seals, and cups containing tallies which he throws down to indicate the number of blows of punishment. The figure of a unicorn appears on the wall behind the judge, and an inscription exhorts mercy. No counsel is allowed to plead, but the licensed notary may read the documents in court and even explain circumstances. The presiding officer may call in assistants if he chooses. There is a record of a Governor-General who was assisted by sixteen magistrates. No oaths are taken in the court room, and hearsay evidence may send a man to the headsman. "The general policy . . . is to quash cases and repress appeals." Governor Li of Canton wrote in 1834: "If the people are impressed with a due dread of punishment, they will return to respectful habits." Most of the laws of court procedure are disregarded, and civil and criminal law are continually confused.

Confessions of both accused and witnesses are extorted by a regular method. Torture is defined by the Chinese as legal and illegal. The legal instruments are three grooved boards for compressing the ankles, five round sticks for compressing the fingers, and the bamboo. The kind and rigor of the torture depends on the nature of the magistrate. There is an instance of two criminals being nailed to the same board; one of them tore his hands loose, was fastened again, and died soon afterward. Beds of iron, red hot spikes and boiling water have all been employed against witnesses as well as prisoners. Cutting the tendon of Achilles, forcing the prisoner to kneel on chains or on pounded glass, sand and salt mixed together are not unheard-of methods of procuring needful information, — for unless there is confession, there can be no punishment. One mandarin went so far as to shut up a refractory prisoner in a coffin for a few moments. Unfortunately the

prisoner was dead when the lid was removed. It should be borne in mind, however, that notwithstanding the shameful indignities sometimes practised in Chinese courts of law, Persia and Turkey are much more culpable in this respect. The legal punishments—imprisonment and torture are not accounted punishments at all!—will be named in the outline of the Penal Code.

All the laws of the Chinese Empire are to be found in the remarkably simple and concise *Ta Tsing Len Li*,—"Statutes and Rescripts of the Great Pure Dynasty." There are dozens of volumes of the compact characters. This is not a sealed book; everybody who will take the trouble may refer to it. To each statute clauses are attached having a force equal with that of the statute itself. But no authorized reports of cases and decisions, whether of the Supreme Court or of the Provincial Courts, are published for general use, although record of all such cases and decisions is kept in the courts where they are decided. Sir George Staunton's monumental translated selections from the Laws is an encyclopædic-looking volume which appeared at the beginning of the nineteenth century. Says the author in his preface:

"When we turn from the ravings of the Zendavesta or the Puranas to the tone of sense and business in this Chinese collection, it is like passing from darkness to light; from the drivelings of dotage to the exercise of an improved understanding; and redundant and minute as these laws are in many particulars, we scarcely know an European code that is at once so copious and so consistent, or is nearly so freed from intricacy, bigotry and fiction. . . . The laws are divided into the *lut*, or fundamental laws, and *lai*, supplementary laws; the former are permanent; the latter, which are liable to revision every five years, are the 'modifications, extensions, and restrictions of the fundamental laws.'"

The main defects of the Penal Code appear to be that the subject has no specific liberty or rights. There are many vague and obsolete statutes for the mandarins to puzzle over or to construe broadly; and in the Code, too, there is plenty of opportunity for relief for people who want to get even with their neighbors. It is a bad policy for responsibility to be laid on the officers of justice. In China there is a tendency to cover up crime; but it goes on, just the same. When so often prisoners are starved to death, the public naturally grows more and more callous. There is the case of a wretch who was allowed to starve in his cangue, or wooden collar, while the citizens of Peking looked on.

Book I. of the Penal Code<sup>1</sup> states that present punishments are confined to flogging with the bamboo, banishment, and death by decapitation or strangulation. The ordinary instruments of punishment are the flat, polished piece of bamboo, the cangue or square wooden collar of thirty pounds' weight, the iron chain, seven feet long, of seven pounds' weight, manacles of wood for males only, and iron fetters. Great responsibility is laid upon the presiding magistrate. People think that a judge should be able to read the heart of the culprit; therefore confession is regarded as an understood thing. There is practically no more severe torture in China. There is much lenity in the Code, for the constructions put upon it are not always literal. Punishments are light during the excessive heat of summer. There is full and free pardon for prompt surrender and confession. Of two or more offences, only the principal one draws down punishment. Ten heinous crimes are excepted from any general act of grace: rebellion, destruction of imperial tombs, treachery to the State, parricide, murder of three persons in one family,

<sup>1</sup> There is here given an abridgment from Giles's outline in his *Historic China, and Other Sketches*.

sacrilege, filial impiety, family discord, official insubordination, and incest. Children under seven and persons over ninety are not punishable under any circumstances, except for treason and rebellion. In all cases, except those of capital crimes, the punishment proper of offenders under fifteen or over seventy may be redeemed by the payment of a fine. Foreigners guilty of crime were dealt with according to the Code, until wars and treaties brought the extra-territorial principle into force.

In Book II. there are laws relating to officials. The mandarins seldom know much about the Code, depending upon their advisers for the necessary information. Sons are not allowed to separate and set up their own establishments. There may be only one legal wife; and a second wife may not be married as long as the first wife is alive; but a man is free to have as many concubines as he chooses. It is custom that limits their number in most cases. Marriage with an actress or musician is prohibited, and priests of Tao and Buddha must not marry. Smuggling is punishable by fifty blows and a forfeiture of half the value of the goods, part of the forfeiture going to the informers. Interest on money lent must not exceed three *per cent.* a month. Property found lying about without an owner is to be delivered to the District Magistrate within five days; if the owner is discovered within thirty days, the finder receives half the sum as a reward.

Ceremonial observances and sumptuary laws appear in Book IV. Ancient nature worship is discernible beneath the sacrifices to Heaven and Earth. The very cook-book of Chinese housewives is here made legal, the recipes being detailed according to established practice. If a cook serves illegal food, he must swallow the offending viands and receive a hundred lashes. Dress is described for all classes. Cremation and water-burial

are forbidden, although the children of a man dying in a distant country may consume their father's corpse with fire. And the cremation of priests is tolerated in practice, although it is not provided for in the Code.

Book V. is chiefly concerned with military organization and the protection of the frontiers. One hundred blows is administered for passing without permission through the gates of the imperial enclosure, and death by strangulation awaits the man who enters the room occupied by the Emperor. Decapitation and mutilation of the body is in store for the soldier who in the face of an enemy sets the example of retreat.

Book VI. is rich in criminal law. It opens with the details of a punishment known as *Ling-Chee*,—"the lingering death"; a slow and painful execution for all persons guilty of high treason, including the destruction, as principal or accessory, of the tombs of the emperors of the present dynasty. Giles states that no one has seen a malefactor sliced to death: but Archdeacon Gray once came upon the remains of a body after the operation had been performed, and gives positive instances. Attempt to steal brings on fifty blows, while actual theft is punished according to a fixed scale, ranging from sixty blows for one ounce of silver to death by strangulation for one hundred and twenty ounces and upward. At the first conviction the criminal is branded on the left arm with the character "Thief"; at the second, with the same character on the right arm; at the third offence, or for defacement of the marks, with death. There are *ad valorem* penalties for theft of grain and fruit. Stealing from relatives is not punished with extraordinary harshness. Obtaining money under false pretenses is punished according to the same scale as ordinary petty larceny, only without branding. If the victim is wounded in the course of robbery, the criminal is beheaded.

All concerned in highway robbery meet with the same death. Kidnapping by stratagem is punished by one hundred blows and banishment to a distance of three thousand *li* (about three hundred and seventy-one miles). The opener of a buried coffin is put to death. Actual theft is carefully defined. Money and easily portable articles must have been removed from the place where found, with the exception of jewels, *etc.*: mere possession of these is equivalent to theft. Large articles must have been placed in a cart, or on the back of an animal, horses and cattle taken out of the stable. For unsuccessful attempt to murder, without wounds, the penalty is one hundred blows and three years' banishment. A son may kill on the spot the murderer of his father or mother. Again, a husband may kill on the spot his adulterous wife or her paramour, — but not at a later time. If a physician violates the rules of medicine in his practice, and a patient dies under the treatment, the physician in question loses his head. There is also decapitation in store for a slave who designedly strikes his master. If a wife strikes her husband, she is bamboozed a hundred times and her husband is compelled to divorce her; but if a husband strikes his wife, there is no punishment, unless an open wound results. If the wife dies of a beating, her husband is strangled.

Every prosecutor must begin by filing a charge at the lowest tribunal of justice within the district, under a penalty of fifty blows. Filing a false charge is punished somewhat more heavily than the accused would have been punished. The authors of anonymous charges are liable to strangulation, whether

the charges are true or not. A parent, grandparent or husband may escape all punishment by voluntary surrender. Decapitation is the penalty for forging a seal, issuing a spurious edition of the Imperial Almanac, or passing off as a Government official; strangulation for counterfeiting common coin of the realm and committing rape (age limit twelve years). Gambling is punished by eighty blows and forfeiture of the stakes. Still, a few friends at a private house may play quietly for food and drink. If arson results in the death of any one by burning, the penalty is death. There are administered forty blows for setting fire to one's own house. The law is disregarded which forbids the representation on public or private stages of "emperors, empresses, famous princes and ministers and generals of former ages, *etc.*, . . . nevertheless it is not intended by this law to prohibit the exhibition upon the stage of fictitious characters of just and upright men, of chaste wives, and pious and obedient children, all of which may tend to dispose the minds of the spectators to virtue." There are elaborate laws pertaining to the arrest, trial and execution of prisoners. Constables are punished for failing to recover stolen property or to produce thieves. Women are not to go to prison except in capital cases, or for adultery. And lictors are not to inflict blows with great noise and little pain!

Book VII. relates entirely to public works. There are regulations for the preservation of public buildings, high roads and bridges, and for the prevention of floods by the maintenance of durable embankments along the shores of rivers.



WOMEN UNDER EARLY CHRISTIAN LAW.

By R. VASHON ROGERS.

"YE wives, be in subjection to your own husbands," ordered Peter. "Let the women learn in silence with all subjection," commanded Paul.

Is the opinion so long and so widely held that woman owes her present high position to Christianity a correct one? Or should it be relegated to the region of myths like the stories of William Tell, the Wandering Jew, the Bluebeardness of Henry the Eighth, the virtues of Elizabeth? Principal Donaldson, of Aberdeen, declares that he used to hold that opinion, but that he had been unable to see that in the first three centuries of this era Christianity had any favorable effect on the position of women, and that on the contrary he found that it tended to lower their character and contract the range of their activity.

Until the State professed the new faith the laws and rules of conduct that governed and controlled the Christians were promulgated by the Apostles and the early bishops and fathers of the Church, and their decisions and their *dicta* were (we doubt not) as much revered and obeyed by their followers as were the rulings of the Rabbis by the adherents of the elder Church, or in later times the decrees of Mr. Joseph Smith or Brigham Young by the Latter Day Saints.

At the first stage, without doubt, women took a prominent part in the Christian Church, but in a short time they only appeared in three capacities, deaconesses, widows and martyrs. The widows looked after the sick, the needy, the destitute: they had no spiritual duties to perform: they were not permitted to teach, any more than they were among the Jews, or the Hindoos, or among the Mahometans. A widow was "to sit at home, sing, pray, read, watch, and fast;

speaking to God continually in songs and hymns."

Nor had the deaconess any spiritual function: nor could she teach. Tertullian disapproved of women baptising: but the Canon Law allowed it when no one else was available to perform the ordinance.

No doubt Paul settles the question as to women teaching: his opinion of the sex is a stern one and the rules he lays down are very restrictive. The Ebionites explain his attitude towards women: he was, they say, not a Jew but a Greek, who went up to Jerusalem and there fell in love with the daughter of the High Priest; to gain her hand he became a proselyte; he proposed; was refused; and, enraged, sought to destroy the faith which she held dear, and wrote against circumcision, the Sabbath and the Law.

Paul's sayings we all know. Some of the Christian writers surpassed him in the strength of their remarks.

Tertullian (150-230) says to them: "Do you know that each one of you is an Eve? The sentence of God on this sex of yours lives in this age: the guilt must of necessity live too. You are the devils' gateway; you are the unsealer of that forbidden tree; you are the first deserter of the divine law; you are she who persuaded him whom the devil was not valiant enough to attack. You destroyed so easily God's image, man. On account of your desert, that is death, even the son of God had to die."

Gentle Clement of Alexandria (150-230) says: "Nothing disgraceful is proper for man, who is endowed with reason; much less for woman, to whom it brings shame even to reflect of what nature she is."

Gregory Thaumaturgus (210-270) asserts:



"Moreover among all women I sought for chastity proper to them, and I found it in none. And verily a person may find one man chaste among a thousand, but a woman never."

The Testament of the Twelve Patriarchs makes a similar statement and adds: "By means of their adornment they deceive first the minds of men, and they instill poison by the glance of their eye, and then they take them captive by their doings," and therefore "men should guard their senses against every woman." "The angel of God shewed me that forever do women bear rule over king and beggar alike: and from the king they take away his glory, and from the valiant man his strength, and from the beggar even that little which is the stay of his poverty."

Chrysostom (347-407) pronounced woman to be "a necessary evil, a natural temptation, a desirable calamity, a domestic peril, a deadly fascinator, and a painted ill." However, in another passage of singular beauty he compares the duties of a woman and her husband, making the former in some respects the more dignified. And in a third place he says that it is a shame for a man to beat his female slave, much more his wife.

Professor Donaldson says that "The early Christians considered man a human being made for the highest and noblest purposes: woman, a female made to serve only one. She was on the earth to inflame the heart of man with every evil passion. She was a fire-ship continually striving to get alongside the male man-of-war to blow him up into pieces."

Saint Paul ordered that women should adorn themselves in modest apparel, not with braided hair, or gold or pearls, or costly array. Saint Peter, too, forbade plaiting the hair and wearing gold ornaments.

Commodian says: "It is not right to God that a faithful Christian woman should be adorned." Clement of Alexandria: "Head-dresses and varieties of head-dresses, and

elaborate braidings and infinite modes of dressing the hair, and costly mirrors in which they arrange their costumes, are characteristic of women who have lost all shame."

Cyprian, speaking to virgins about their hair, asks: "Are sincerity and truth preserved when what is sincere is polluted by adulterous colors, and what is true is changed into a lie by the deceitful dyes of medicaments? Your Lord says 'Thou canst not make one hair black or white,' and you, in order to overcome the word of the Lord, will be more mighty than He, and stain your hair with a daring endeavor and with profane contempt; with evil presage of the future, make a beginning to yourself already of flame-colored hair." As to tinting the eyes: "You cannot see God, since your eyes are not those which God made, but those which the devil has spoiled. You have followed him, you have imitated the red and painted eyes of the serpent."

Centuries after, William Penn in the same spirit bursts forth: "Did Eve, Susannah, Elizabeth and the Virgin Mary use to curl, powder, patch, paint, wear false locks of strange colors?"

The teachings of the most enlightened of the Fathers was that there was no natural inferiority in the woman to the man. Theodoret insists emphatically on their exact equality, and says that God made woman from man in order that the tendencies and actions of both might be harmonious.

Among some of the heretical sects women were far more honored than among the orthodox. Among the Quintiliani, for instance, frequently virgins, clad in white and bearing torches, addressed the people in their churches. Women, also, were made deacons, elders and bishops. They gave special thanks to Eve because she first ate of the tree of knowledge. These people were sometimes called Bread-and-Cheeseites, be-

cause they celebrated their mysteries with bread and cheese.

Women being what the Fathers said, it were "well for a man not to touch a woman." Saint Paul held celibacy to be better than marriage, yet in compassion for the weakness of human nature he allowed the latter. But the Fathers pushed the matter further. Origen thought marriage profane and impure: Tertullian said that celibacy must be chosen, even if mankind should perish; in Saint Augustine's heaven the unmarried shine like beaming stars, the wedded as bedimmed ones. If Adam had been obedient (these good men thought), he would have lived a virgin forever and paradise might have been peopled with a race of innocent and immortal beings by some "budding" process, akin to that known in the vegetable world. As the old patriarch was, according to the Jews, one thousand cubits high, there was ample material to start with. But we wander.

Many of the early sects as well strongly condemned matrimony, forbidding men to beget children, saying that woman was the work of the devil and therefore they that married fulfilled the works of the devil, and that no one that lived in wedlock could hope to see God. Others held that marriage was a thing belonging only to the Old Testament and that it was abrogated by the coming of Christ. But the council of Gangra came to the rescue of this holy estate and thundered: "If any one condemns marriage, or blames or abhors a woman, who is otherwise faithful and pious, for sleeping with her husband as if on that account she could not enter into the kingdom of God; let him be anathema. If any woman forsake her husband minding to turn recluse out of an abhorrence of matrimony; let her be anathema." The Apostolical canons speak to the same effect.

If the Church preferred celibacy we can

readily imagine what was thought of a second marriage; even though Paul allowed and advised it for certain young widows.

The Apostolical Constitutions permitted second marriages, reprov'd third marriages and forbade fourth marriages. Origen said that second, third and fourth marriages exclude from the kingdom of heaven,—by that he meant the Church. He allowed that the thrice married are in a state of salvation, but—he added—they will not receive a crown at their Master's hands. Justin Martyr says: "All who by human laws are thrice married are in the eye of our Master sinners." Tertullian remarked: "We acknowledge one marriage, as we do one God." Athenagoras wrote: "A second marriage is only a species of adultery. For he who deprives himself of his first wife, even though she be dead, is a cloaked adulterer."

Minucius Felix said: "We abide by the bond of a single marriage. Let him who marries again do penance for a year. One marrying according to the law is righteous, but second marriage after the promise made at the first is discreditable; not on account of the marriage itself, but because of the falsehood. To take a second wife is, according to Apostolic precept, allowed, but in the nature of things it is fornication. But since it is done by God's permission and allowance, it is honest fornication." (Reichel, *Complete Manual of Canon Law*, vol. I, p. 342, n. 71.) However, the general sentiment of the early Church was in favor of the legality, but against the propriety, of second marriages.

Theodore of Canterbury orders that on a first marriage the couple should refrain from church for thirty days (is this the origin of the honeymoon?) and then do penance for forty days before communicating; but on a second marriage they had to do penance for a year, on Wednesdays and Fridays, and abstain from meat for three Lents. In some

places presbyters were forbidden to take part in the festivities at second marriages.

Leo the Wise, Emperor of the East, was allowed to marry thrice without remonstrance, but when he married a fourth time he was suspended from communion.

The early Emperors in their legislation discouraged second marriages; they legalized the condition (so often used in this enlightened age, and so obnoxious to every sensitive practitioner) that a widow's right to her husband's property should cease on her remarriage. The Leonine Constitutions at the end of the ninth century made a third marriage punishable. Second marriages, by the Canon Law, are forbidden to be blessed by the Church and are a disqualification for orders. Third and fourth marriages in the East are treated as manifest incontinence; and in the Greek church, even at the present day, a fourth marriage is forbidden.

Now a word or two anent marriages in the early church. Christians were not allowed to unite themselves with infidels, or Jews, or heathen, or any of a different religion. Saint Paul so said. (I Cor. vi, 15: II Cor. vi, 14). Cyprian, Tertullian, Jerome, Augustine and a host of others of the Fathers agree thereto; and the councils of Laodicea, Carthage, Agde, Chalcedon, Arles and Eliberis passed canons to the same effect. Constantius made it a capital crime for a Jew to marry a Christian, but laid no penalty upon the Christian marrying the Jew. The edict of Valentinian and Theodosius (which now stands in the Justinian code) said if any Jew presumed to marry a Christian woman or a Christian took to wife a Jewess, the offence was punishable as adultery, that is, by death.

The Church had to be notified of the intention to marry, and persons nearly allied by consanguinity or affinity were forbidden by canon to unite. By the law of the Church and of the early Christian emperors,

the marriage of children under age, without the consent of their parents or guardians, was considered unlawful and the offspring illegitimate; in like manner slaves had to get the consent of their masters. Persons of high rank might not debase themselves by marrying slaves; the civil law required parties to be "*pares genere et moribus*," of equal rank and condition. Constantine passed a law forbidding senators, governors of provinces, or city magistrates to marry slaves, or freedwomen, or actresses, or the daughters of actresses, or of innkeepers, under pain of infamy and outlawry, and of having their children illegitimate and incapable of inheriting their father's property. Under another of Constantine's laws a poor slave who married the common councilman of a city was condemned to the mines, and the indiscreet man was banished for life and had his goods confiscated. To prevent undue coercion, the judge of a province, during the period of administration, could not betroth a woman of his province, nor could his son, grandson, kinsman, councilor, or domestic. Nor could a man marry his ward during her minority, nor could his son. Justinian forbade a man wedding his god-daughter; the council of Trullo went a step further and punished him if he married his god-daughter's mother; the Canon law pushed this further still.

Some of the laws in the Justinian code allowed marriage after lawful divorce; but (according to Bingham) until the council of Trent the Church was divided on this subject; nor were the early Fathers of one mind as to whether an adulterer could marry a woman, after her husband's death, with whom he had committed adultery in the said husband's lifetime. The council of Laodicea prohibited all marriages in Lent; that of Lerida (*an.* 524) added Advent to the forbidden season; while Henry II. made an order (*an.* 1322) prohibiting weddings from

Advent to the Octave of Epiphany, and between Septuagesima and the Octave of Easter, and within fourteen days of the festival of Saint John Baptist, upon fast days and the vigils of solemn festivals.

Women in the primitive Christian times had an advantage over their sisters of to-day in that they had two sets of ceremonies for each marriage, the espousal or betrothing, and the actual wedding. At the espousal the mutual consent of the parties was given; this was confirmed with gifts — the earnest of marrying — called *arrae et arrabones*, and by a ring, a kiss, and the execution of an instrument before witnesses stating the dowry.

The old Roman law "*Lex Papia et Julia*," confirmed by Diocletian and Justinian, shows that while children could not marry without the consent of their parents, yet they could not be compelled to wed contrary to their own inclinations. A virgin betrothed under ten might refuse to complete the marriage, without any forfeiture being incurred; if she was betrothed between ten and twelve and afterwards refused to marry, her parents might be amerced but she was free, as she was under age at the betrothal; if she was above twelve when espoused and had then approved of the contract, she was fined if she refused to complete the agreement. Espousal gifts generally were only given by the man, but a law of Constantine shows that the woman sometimes gave them, for it provides that if either party died before marriage the gifts should return to her or her heirs. To prevent accidents caused by death, or by the falseness or perfidiousness of either party, the law required that these donations be testified by public acts and entered of record, unless they were very small.

The man also gave his intended a ring as a further token of the contract, in this following the practice of the old pagan Romans

and of the Jews; the man had also to give the woman a kiss (according to the laws of Constantine) and the right hands of the couple were joined. A statement of the dowry to which the bride was to be entitled on her husband's death was then set down in writing. All this was done before at least ten witnesses, so that there might be nothing clandestine about it.

After the epousals neither party could marry any other person without incurring severe penalties — which both the civil and ecclesiastical law inflicted — unless the time of marriage was improperly postponed for more than two years. The council of Trullo held it to be downright adultery for a man to wed the betrothed of another, during the life of that other.

The ceremony of epousals was not necessary in every case; Theodosius, in his code, declares that without it the marriage would be good and the children legitimate, if the union was between persons of equal rank, without legal impediment, with the consent of the parties, and the approbation and testimony of friends. Justinian, in one of his novels, ordered the greater dignitaries, the senators and men of high rank not to marry without settling the dowry and ante-nuptial donations, and complying with the other ceremonies; the better sort of military men, tradesmen and men of honorable professions, had only to arrange as to the dowry and to marry publicly, and have their unions recorded; while as to husbandmen, common soldiers, and those of the baser sort, their marriages were legitimate if performed before witnesses, without any instrument in writing. "Yea, if such a one took a woman for his wife upon oath, touching the Holy Gospels, whether in the church or out of the church, the marriage was valid," if the woman could prove it; and after the man's death she could claim one-fourth of his substance

even though she had no writing of dowry to show for it.

As to the marriage ceremony itself. The best authorities hold that for the first three hundred years the solemnities of marriage were usually performed by the ministers of the Church; if one party happened to be a Jew, a heretic or a heathen, it is probable that the church had nothing to do with the union; of course as the State allowed these latter marriages to be celebrated in other ways the Church could not declare them null and void, but could only discipline the offenders thus contracting. From the fourth to the eighth century the primitive way of marrying among Christians was much dishonored and neglected; then came a reformation and a return to the early usage; Charlemagne, in the West, in 780 enacted, that no marriage should be celebrated without the Church's blessing, with sacerdotal prayers and oblations, and whatever unions were performed otherwise should not be accounted true marriages, but adultery, concubinage, or fornication. A little later Leo the Wise revived the same ancient practice in the East.

At the service the bride was veiled, the hands of the parties were joined together, probably a kiss was given, the woman's hair was untied and her tresses allowed to fall, and after the benediction was over and the new couple were ready to depart it was usual to adorn them both with crowns or garlands — the symbols of victory — and then the wife was led by her husband to her new home. The civil law in some cases required this last act, for by a decree of Valens a soldier's wife was freed from the poll-tax, if she could prove that she had been thus taken home. Wedding festivities were allowed, but only in moderation. The council of Laodicea said: "Christians ought not at marriage to indulge in balls and wanton dances, but dine

and sup gravely as become such professors." Chrysostom draws the attention of his hearers to Isaac's marriage with Rebecca, at which he says, there was no Satanical pomp; no cymbals, piping and dancing; no devilish feasting; no scurrilous buffoonery or filthy discourse, but all was gravity, wisdom and modesty. Let husbands and wives now imitate these. (Bingham's *Antiquities*, Book XXII, Ch. I-IV.)

On the question of divorce the ancients were no more agreed than are the moderns. The writers of the Church were divided among themselves, and the laws of the State differed from them all. Most of the Fathers agreed that Christ allowed no just cause of divorce, save fornication; but as to what fornication is they differed. Clement of Alexandria, Tertullian, Chrysostom, Lactantius, Ambrose and Jerome interpreted fornication, or adultery, in the plain and literal sense; one venerable sage cried out: "What God hath joined together, let no man put asunder. Hear this, ye hucksters, who change your wives as you do your clothes; who build new bride-chambers as often and easily as ye do shops at fairs; who marry the portion and the goods, and make wives a mere gain and merchandise; who for any little offence presently write a bill of divorce; who leave many widows alive at once: know of a surety, that marriage cannot be dissolved by any other cause but death only, or adultery."

But Saint Augustine, Hermas and Origen considered that our Saviour meant not only carnal fornication, but spiritual fornication as well, that is idolatry and apostasy, and all crimes of a like nature. Saint Augustine argues that "if infidelity be fornication, idolatry be infidelity, and covetousness be idolatry, there is no doubt but that covetousness is also fornication," and he therefore concludes that for "all lusts which make the soul, by

the ill use of the body, go astray from the law of God and perniciously and abominably corrupt it, a man may without crime put away his wife, and a wife her husband, because the Lord excepted the cause of fornication."

When Constantine came to the throne the laws of the State allowed divorce for other causes besides adultery : a man could divorce his wife, if she was an adulteress, a sorceress or a bawd; and a woman could put away her husband if he was a murderer, a sorcerer or a robber of graves, but not for being a drunkard, a gamester, or a fornicator. Thus early do we see the sinning husband treated more leniently than the unfaithful wife.

The spirit of license and liberty had now mounted into high places ; the Emperor Honorius by one of his laws allowed a man for great crimes to put away his wife and recover both his espousal gift and dowry and marry again as soon as he pleased, and for lesser faults he might put her away did he choose to lose the dowry, and abstain from matrimony for two years. Theodosius objected to the heavy penalties that had been laid upon husbands and wives dissolving marriage ; and in 449 passed a law enacting that, " If any woman found her husband to be an adulterer, or a murderer, or a sorcerer, or attempting anything against the government, or guilty of perjury ; or could prove him to be a robber of graves, or of churches, or upon the highway, or a receiver, or encourager of robbers, or guilty of plagiarism [not the literary kind] or man-stealing ; or that he associated openly, in her sight, with lewd women ; or that he insidiously made attempts against her life, by poison or sword or any other way ; or that he beat her with stripes contrary to the dignity of free-born women : in all such cases she had liberty to right herself by a bill of divorce and make her separation good against him at law." In like manner, " if the husband could prove

his wife to be an adulteress, or a sorceress, or a murderer, or a plagiarist, or a robber of graves or of churches, or a harbinger of robbers ; or that she feasted with strangers against his knowledge or his will ; or that she lodged out all night, without any just or probable cause, against his consent ; or that she frequented the games of the circus, or the theatre, or the place where the gladiators or fencers are used to fight, against his prohibition ; or that she attempted his life in any way ; or was partaker with any one that conspired against the government, or guilty of any false witness or perjury, or laid bold hands upon her husband" : in all these cases the man had equal liberty to give his wife a bill of divorce, and make his action good against her at law. If the woman divorced herself for any other than any of the afore-said reasons she forfeited her dowry and her espousal gifts, and had to remain five years unmarried ; if she did not wait she was reputed infamous and her marriage reckoned as nothing. If the wife rightly proved her case, she kept the dowry and gifts and could marry again within a year. So, if the man proved his case, he kept the dowry and gifts and could marry again so soon as he pleased.

Valentinian III. abolished divorce by mere mutual consent, which (notwithstanding Constantine forbidding it) had again come into vogue. But Anastasius, in 497, turned round again and allowed it and permitted the woman to marry after waiting one year. The far-famed Justinian in 528 re-enacted the Theodosian laws, and added another valid cause of divorce, namely, imbecility in the man : afterwards he allowed men to divorce their wives, if they practised abortion, or went to the common baths with other men, or endeavored while married to be married to another man. Although he abolished some ancient laws which allowed divorce for light and trivial causes, he yet kept the door

wide open, even admitting divorce if either spouse wished to enter the monastic life, or the other was detained long in captivity. But *quantum sufficit*. *Laudator temporis acti* may hold his peace. (Bingham's *Antiquities*, Book XXII, ch. V.)

In the early days such care was taken of the widows, and so liberal were the offerings for their support, that some made a profitable trade out of their widowhood. A regular list of them was kept. To be on the roll of widows one had to conform to the requirements of Saint Paul. (I Tim. v. 9, 10.)

Ambrose, Jerome, Tertullian, St. Augustine, either condemned second marriages, or strongly advised against them: so large numbers of widows, both young and old, took vows of continency. Some appear to have done so only from a desire to gain greater freedom and have a decent cloak for lasciviousness. The civil law was compelled to check this ecclesiastical tendency, though at first it had favored it.

Majorian enacted, after reciting the abuse of the vows of widowhood, that childless widows under forty years of age must marry again or forfeit half their property to the public chest. The Church, in opposition, decreed that any man who married a widow was ineligible for admission to holy orders; or if already in orders, to promotion: and the widow of a clerk who married again was liable to perpetual seclusion in a convent.

For several centuries widows who took the vows were allowed to live in their own houses. This gave rise to dissatisfaction and in the eighth century Peppin and the Gallican clergy put to the Pope the straight question: "Can widows who live in their own houses save their souls?" His Holiness shirked the question. In the next century the Gallican Church insisted upon widows living in monasteries: although the then Pope objected, but eventually the Gallican

idea prevailed, and the taking the vows of widowhood implied entrance into a monastery, and thus the order of widows was merged into that of nuns.

A widow who, after making a solemn vow of continence, broke her vow was visited with severe ecclesiastical censure, sometimes with excommunication for a shorter or longer period. In the Eastern Church a deaconess who married was punished with death and confiscation. (Smith and Cheetham *Dic. Ch. Antiquities*.)

"Salute one another with a holy kiss." The early Christians in their public meetings carried the Apostolic decree into effect and greeted each other with a kiss. Soon it was found that in too many cases this was only "the food by which the flame of passion was fed"; and it became necessary to be careful in its use. Athenagoras quotes a saying which he attributes to our Lord: "Whoever kisses a second time, because he has found pleasure in it, commits a sin." Clement of Alexandria says: "Love is not tested by a kiss but by kindly feeling. But there are those who do nothing but make the churches resound with kisses. For this very thing, the shameless use of the kiss, which ought to be mystic, occasions foul suspicion and evil reports."

Many of the early councils regulated the "kiss" by canon. "The men shall kiss one another, and the women shall kiss other women, nor shall men give the kiss to them" became the law. Among the Dunkers, in Pennsylvania, at the present day the sacred kiss is started by the bishop and passed down the rows of solemn-looking men; when they have all exchanged this symbol of love a married man kisses his wife and the sweet mystic sign flashes from woman to woman. In the Oriental church the kiss of peace is still given to the newly baptized and in the celebration of the Eucharist.

At the espousals of primitive Christians, as we have said, the contract to marry was solemnly ratified by a kiss bestowed by the man on his future wife. Tertullian says this was an old heathen custom; being a good and innocent one it was adopted by Christians. So much stress was laid upon it as the ratification of espousals that Constantine made the inheritance of half the espousal gifts (if one party died before the consummation of the marriage) to depend upon whether or not the kiss had been given; if there was no kiss the presents returned to the donor or his heirs. (*Cod. Theodos. B. III, Tit. 5, De Sponsalibus: Cod. Justin. Libr. V. De Don. Ante Nupt. 16.*)

Many of the early councils passed canons regulating the age at which the veil could be taken, some fixed it at twenty-five, others at forty: Gregory the Great said women should not be veiled before sixty, although the profession might be made sooner. Young women were forbidden to become nuns without the consent of their parents or guardians.

It was not until the Benedictine rule had been established in Europe that the vow of virginity was regarded as absolutely irrevocable. At first a distinction was recognized between lawful matrimony and incontinency: but in course of time the same stigma of infamy was branded on a nun marrying as on one guilty of gross immorality: and the marriage of one already a bride of Christ was considered adultery. Basil ordered a penance of one or two years before restoration to the communion: the council of Valence, in the fourth century sentenced nuns marrying to a long but not perpetual excommunication. The Theodosian Code allowed them to return to the world at any time before reaching the age of forty, especially if they had been compelled by their parents to take the veil. Pope Innocent I, in the fifth century, forbade a nun after marrying or being seduced to be restored

to communion, unless the partner of her guilt had retired into the cloister. Stronger and stronger grew the objection to nuns marrying. The council of Macon excommunicated both parties forever. The third council of Paris pronounced anathema against any one presuming to tempt a nun to marry: Gregory the Great ordered nuns who otherwise broke their vow of chastity to be transferred to a stricter monastery for penance.

In the sixth century by the rule of the Bishop of Arles nuns were never to go out of the convent; were to have nothing of their own; were to be allowed the luxury of a bath only in the case of sickness. If a slave was brought by a nun into the convent she became free. According to the rule ascribed to Columba of Iona, continual silence, frequent confessions, a very spare diet and very hard labor were prescribed for nuns.

Charlemagne prohibited abbesses laying hands on any one, or pronouncing a blessing: his successor forbade them walking alone. In the seventh century they took part in synods. In feudal times they performed their service to the king by proxy.

The council of Gangra condemned the practice of nuns dressing like monks and shaving their heads. The council of Ancyra forbade consecrated virgins associating with men, even if sisters. By the rule of Cæsarius no man save a bishop, the officiating clergy, and the steward were allowed to enter within the walls of a nunnery. A nun could not see a monk save in the presence of the abbess. (*Smith and Cheetham, Dic. Ch. Antiquities.*)

A council at Auxerre, in 579, forbade a woman receiving the Eucharist in her naked hand, requiring her to put on a white linen glove before touching it.

Speaking of women in the fourth century, Hilary, the Deacon, remarked: "*Non docere enim potest, non testes esse, neque fidem dicere, neque judicare.*"



## A QUESTION OF JURISDICTION.

BY HENRY BURNS GEER.

THAT bad blood existed between Sim Skipwith and Lawson Dykes of the sixth judicial district, was well known to the men of the community. That it would some day result in serious trouble, was anticipated. It was not the outgrowth of a love affair. On the contrary, it was a matter of business, in which an old worn-out rail fence figured. The dividing line between their respective homesteads was the basis of the trouble, and the old fence covered, or was supposed to cover, the limit of the two properties.

But the fence had been blown down in sections, and reset so many times, that the true line had in a manner been lost, and both parties claimed a spring that gushed from a hillside right by the side of the fence. The spring, in fact, was the vital point. There, too, — very unfortunately, — the fence had blown down once, and Skipwith, in resetting it, had taken in the spring on his land, although, previously, it had been on Dykes' side of the fence. The latter promptly reset the fence, re-enclosing the water source on his side.

When the men met at the usual Saturday gathering on the public square in town, a few days later, they had a violent quarrel about the matter; but friends interfered, and no blood was spilled, as was at one time expected.

Two days later, however, Dykes' lifeless body, with a charge of buckshot in the breast, was found on the highway that divided the fifth from the sixth judicial district. Knowledge of the bad blood between the two men, and the quarrel, together with other damaging circumstantial evidence, led to the arrest of Skipwith, charged with the assassination of Dykes.

Then the question of jurisdiction arose, and for several months it threatened to defeat the ends of justice. It was the old question of division, even after death of one of the original contestants. For, while the dead body had been found in the road that divided the two civil districts, yet the general belief was that the murder had been committed in the woods, either on one side or the other; but, a heavy shower having fallen before the remains were discovered, it seemed impossible to determine with any degree of accuracy on which side of the highway, and, therefore, in which district, the deed had been committed.

The officers of the sixth district had arrested Skipwith, and were holding him for trial; but his friends had made such a strong point against their right of jurisdiction, that the trial had been postponed from term to term, until several months had elapsed, and there was much apprehension among the friends of Dykes, that Skipwith might escape punishment entirely, notwithstanding the fact that it was pretty generally conceded that he was guilty of the awful crime.

Finally, however, an unexpected witness — a dumb creature — gave evidence to the authorities that settled the question of jurisdiction and resulted in the trial and conviction of Sim Skipwith.

Perry Nelson, a neighbor of the murdered man's family, had occasion to borrow a horse of his widow to ride to town; and it so happened that she loaned him "Selim," the favorite saddle-horse and pet animal of her deceased husband. It was the first time that "Selim" had been off of the premises since the tragedy, on which occasion he had borne his beloved master to his death.

Nelson, *en route* to town, passed along the

highway on which poor Dykes had been killed. This, of itself, would ordinarily have been of no moment. But subsequent events proved it of the greatest importance in shaping the ends of justice.

Several other neighbors, also mounted, accompanied Nelson. The journey was of the ordinary only, until they reached the point in the highway where the remains of Dykes had been found; and then, to the surprise of all, the horse, "Selim," on which Mr. Nelson was mounted, became excited and fractious. His flesh quivered and his nostrils dilated. He seemed bent on taking to the woods at that point, and finally became unmanageable:

"Give him free rein, Perry!" shouted an elderly man of the party.

The suggestion was accepted, and when the bit relaxed, the excited but intelligent animal sprang into the brush, and galloped

swiftly to a large tree, where he pawed the earth, and nickered piteously. Then he circled about, with his head low down, as if trying to follow a scent; only to return to the tree, to paw the earth more, and tremble violently.

"Gentlemen," said Esquire Peterson; "the murder of Lawson Dykes was committed here at the base of this tree, and the only witness—his faithful horse—is trying to tell us so."

"I believe it," said Nelson firmly, a view that the remainder of the party concurred in.

"And this tree," continued Esquire Peterson, "is in the sixth district!"

When the court convened a few days later, "Selim's evidence," as they termed it, was sworn to by the whole party that witnessed the manifestations, and the question of jurisdiction was settled; resulting in the conviction of Sim Skipwith.

## LEGAL DITTIES.

### I.

SING a song of whiskey,  
A body full of rye,  
Four and twenty jail-birds  
Locked high and dry.  
When the jail was opened  
The judge began to sing,  
"You'll go up for seven days  
To end your little fling."

### II.

Dickery, dickery, hock!  
The crook put up the clock:  
Policeman come,  
Away he run,  
Dickery, dickery, hock!

## LONDON LEGAL LETTER.

LONDON, OCTOBER, 1902.

IT may be of interest to some aspiring women lawyers in America to know that there is one country in the world where their services are urgently needed and where, if once admitted to practice, they need fear no competition from "mere men." Among the many legal subjects which have been discussed in the newspapers and the various conferences during the long vacation none has exceeded in interest that of certain women in India who are known as "Perdahmshins," or women who "sit in seclusion." Every Mohammedan woman is necessarily a Perdahmshin, and in the Northwest provinces of India none but the least of the servants are exempt from the strict observances of the caste. These women are required to sit in such seclusion that no man can see them and they can see no man. They can have no intercourse with the outside world nor transact any business which requires the intervention of one of the male sex except from behind a curtain, while the man must have his eyes heavily bandaged. Many women of them own large properties in their own right, while others are entitled to the enjoyment of life estates. Some in fact are very rich and have authority over money and lands of great value and extent. All their business must be transacted through agents and servants, with whom they may converse, but whom they never have seen and can never see. The servants likewise have no knowledge of the identity of their mistresses other than that which can be gathered from the sound of their voices. It is unnecessary to say that in these circumstances a principal is at the mercy of her dishonest agent. An easy door is opened to his frauds, and few are able to withstand the temptation,

especially as the injured individual has no way of seeking redress except through the wrong-doer. The courts of India have been obliged to recognize the evil, for their records abound with instances of speculation and ruin, and have in many instances made the Perdahmshins wards of Chancery in order to throw the protection of the law around them. The Privy Council has by an order directed that all of the class shall be treated as persons suffering from disabilities. But even these provisions are ineffective to prevent these women as a class from being made the victims of their dishonest agents. The curator who travels over the country to examine into his ward's affairs must be blindfolded before he can interview her, and she has no opportunity whatever of seeing his face from her seat behind the curtain. He is not likely to inspire her with confidence, for she cannot be sure that he is not an impostor or attended by her enemies, while he, in turn, has no means of ascertaining if the woman to whom he is speaking is in fact the person she purports to be or, if she is the right person, if her statements are made of her own free-will and without coercion. Although subject to this seclusion, these women are in many cases well educated and thoroughly intelligent, and it is from letters which they have been able to write in private and to procure to be delivered to the judges of the courts that in some instances injustice and wholesale robbery has been prevented, and the injustice of the whole system has come to light.

It is now proposed that women lawyers be admitted to practice in all of the Indian Courts in whose jurisdiction this caste prevails, and that all Perdahmshins be acquainted

with the fact and be encouraged to employ them. These women lawyers could see their clients and have unrestricted interviews face to face with them, free from the presence of third persons. This plan is now being urged in their country by a Miss Sorabji, who is herself not only an Indian woman but a lawyer. She is the peer of any English or American woman so far as intelligence and education are concerned. She holds a Bachelor of Civil Laws degree from Oxford University, and after considerable training in a solicitor's office in London has practised for seven years in India. She has recently written a long article in *The Times* to lay the case of her Indian sisters before the world, and her story has been supplemented by the narration of actual experiences by eminent local Indian judges, or rather local English judges in India, for all judges of the High Court in India are appointed from the English bar. The excellent results which have attended the agitation in favor of the general employment of female physicians among the Indian women, who by reason of their caste cannot be treated by male doctors, gives encouragement to believe that a like success will be achieved by female lawyers in India. This is a matter which has an additional interest to Americans from the fact that it will doubtless be brought about under the auspices and patronage of Lady Curzon, who, while the wife of the Viceroy of India, is a womanly American woman.

Master Macdonell, from whose interesting compilations for his annual reports on the Civil Judiciary statistic extracts have more than once appeared in these columns, has recently contributed an interesting paper to the current number of *The Journal of the Society of Comparative Legislation*, on the number and the pay of judges in different countries. It is unfortunate that the statistics from America are so meagre. In an ex-

planatory foot-note he explains that he has been unable to obtain other information from the United States than that furnished in the Register of the Department of Justice at Washington, which gives the number of Federal judges, including those of the District of Columbia, as one hundred and thirty-four. The summary of Master Macdonell's investigation is so interesting that I set it out in full, as follows:

COUNTRY.	NUMBER OF JUDGES.			Number of Judges per 100,000 of estimated population.		
	Salaried	Un-salaried	Total	Salaried	Un-salaried	Total
England.....	276	17,248	17,524	0.86	53.70	54.56
Scotland.....	76	—	—	1.76	—	—
Ireland.....	112	4,897	5,009	2.49	108.80	111.29
Austria.....	4,541	—	—	17.35	—	—
Belgium.....	545	754	1,300	8.01	11.05	19.06
Denmark.....	186	40	226	7.76	1.67	9.43
France.....	7,803	—	7,803	20.16	—	20.16
Germany.....	8,186	—	—	14.63	—	—
Hungary.....	2,658	—	—	13.79	—	—
Italy.....	3,645	8,720	12,365	11.37	27.21	38.58
Netherlands..	338	371	709	6.53	7.17	13.70
Norway.....	172	1,232	1,404	7.83	56.08	63.91
Russia.....	3,180	—	—	2.80	—	—
Sweden.....	497	1,428	1,925	9.70	27.87	37.57
Switzerland..	—	—	—	—	—	—
Federal Court	23	—	—	0.70	—	—
CantondeVaud	164	—	—	—	—	—

It is not, I trust, too much to hope that some student in America of sociology or jurisprudence will supplement Master Macdonell's work so far as the United States is concerned, and compile a list of all of the judges in the various States with information as to their pay. Master Macdonell classifies the judges as paid and unpaid, a distinction which is without a difference in the United States but which is very marked in this country. Except the High Court judges, who sit to try criminals at assize, and at the Central Criminal Court in London, there have until comparatively recent years been no paid magistrates in England. Even to this day nearly all of the magistrates, outside of a few of the large towns, who, at quarter sessions, try felonies as well as misdemeanors, are gentlemen who sit for the honor of the position, and who have no fee or reward except the added dignity they

thus acquire and the consciousness of doing their duty. So far as paid judges are concerned there seems to be the greatest discrepancy between the various countries. While the Lord Chief Justice of England receives £8,000, the Master of the Rolls £6,000, and the judges of the King's Bench and the Chancery Courts get £5,000 each, the chief judge of the French Court of Appeals receives only £1,200, and the President of the German Court of last resort only £1,250. Some of the French, German and Italian judges of the rank of American circuit judges or English High Court judges are paid only £200 to £700. One of the noticeable features of the judicial system that prevails on the continent is the reluctance to have courts constituted of one judge only, and it may be said that this disinclination is not unnaturally the greatest in these countries in which the judges receive the lowest salaries. In the French Court of Cassation, for example, no case can be heard unless at least eleven judges are present on the bench to hear it! The obvious moral is that it is cheaper and altogether more satisfactory to have a highly paid judiciary, small in numbers, constituted of the very best material the bar affords, than poorly paid judges of whose abilities there is such distrust that it is necessary to employ nearly a baker's dozen of them to hear an important case on appeal.

At the recent annual Congress of the Trades Unions of England the naturalization laws of the country were considered and resolutions were passed urging Parliament to reduce the cost of obtaining naturalization, and to simplify the procedure. At present, under the Act of 1870, a foreigner desirous

of becoming an English citizen must have resided in England, before presenting his petition, a complete period of five years. His petition must be presented to one of the Secretaries of State, accompanied by sworn declarations from two householders, themselves citizens, that they have personally known the applicant during the five years of his residence in England, and by the declaration of two other householders that they believe the applicant to be a fit and proper person to become a citizen of the country of his adoption. In the ordinary practice a period of nearly six weeks elapses between the filing of the petition and the granting of the certificate of citizenship, and the cost of the procedure is about thirty dollars. While this must seem a vigorous measure in contrast with the ease with which foreigners become citizens of the United States, it certainly has the result of ensuring that only those who are qualified and who are willing to make some sacrifice for the privilege shall become citizens. It is remarkable, however, that the trades unionists, who are generally bent upon excluding from the working force of the community all outside their own ranks, should be disposed in this instance to open wider the doors of admission to the country. The motive probably lies in the fact that there are now within their membership a large number of foreigners who, as such, are not entitled to the suffrage, and who are not qualified or willing under the present restrictions to obtain it. If the mountain is brought to Mahomet they will acknowledge the courtesy by voting for labor members of Parliament — a scheme that may not commend itself to our law makers.

STUFF GOWN.



# The Green Bag.

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor,  
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

*The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae anecdotes, etc.*

## NOTES.

A WASHINGTON lawyer writes us: The recent death of Mr. Justice Gray reminds me of a remark attributed to the late Mr. Justice Bradley of the Supreme Court of the United States. It seems that a would be jurist was asking Mr. Justice Bradley how to pronounce the word "lien."

"*Leen*," said the Justice.

"But some persons pronounce it '*li-en*'" [with long "i"].

"Yes; Gray does, — and he has been spoken to about it, too."

"BUT what does your Honor claim?" asked a young practitioner of Judge Rockwell, who had ruled out certain proposed testimony, and the young man wanted to talk about it:

"I don't claim anything. Go on with your case."

He went on.

COLONEL C — was trying an important criminal case in a Georgia court. He early discovered that he had a "powerful" difficult case, and raised an intricate question of criminal law, taking a position which was not law, in the hope of securing a continuance.

He suggested the absolute necessity of examining some authorities, which, of course, he said, could not be found in a small town like the county seat. That couldn't be expected. He wanted access to the fine library at home.

The prosecuting attorney asked him what particular authority he had in mind.

"Well," he replied, "there is Bishop on Criminal Law, for one thing."

"I have that in my office, and will be pleased to loan it to you," responded the prosecuting attorney.

"Then there is Russell, who treats of the question more elaborately than Bishop, perhaps," urged Colonel C —.

"I am glad to be able to tender the use of that work, also."

"I ought to have a look at Roscoe."

"I have Roscoe, fortunately. You are welcome to use it."

"Malone is more important to my client's interests than all of the others put together."

It so happened that the father of the prosecuting attorney had been a country lawyer in extensive practice, and had accumulated one of the very best libraries in the State, which he had left to his son. He had made many additions, and was fortified for almost any emergency.

"I shall take pleasure in handing you Malone," he said.

The Colonel, more than six feet in height, gray but alert, bent over and reflected, scratched his head and said to the judge: "I would like to think this matter over for awhile, and examine the authorities which my friend tenders. I beg to suggest that we adjourn, at least until tomorrow morning."

That night he visited his opponent's office, and made a respectable pretence of examining the authorities, finding them all dead against him. He tried to make terms with the enemy, but the enemy was obdurate.

The next morning he appeared in court, and when the case was called up, renewed his application for a continuance.

"What are your grounds, Colonel?" asked the judge.

"If your Honor please, I want to continue upon general principles."

To the amazement of the prosecuting attorney, the application was granted.

GATES, a lawyer from Lynn, was a contemporary of Choate and Saltonstall. He was in

the habit of writing for publication in the newspapers. He wrote and published a lengthy article for which he was indicted. He was a poor man and intended to try his own case. Choate hearing of his trouble said to Saltonstall, "Gates is in trouble; don't you think that we ought to help him out?" To this Saltonstall agreed and was sent by Choate to Gates to talk it over and see what could be done. Gates was very grateful and desired that Mr. Choate should try the case for him.

The case was called and the article was read to the jury, with such explanations made that showed Gates to be the author of it. This closed the government case. Mr. Choate then arose for the defense, and taking the paper from his pocket proceeded to read the same article slowly and with such intonation that when he had finished reading it, the complainant arose and said: "If that is the meaning of the article just read we have no reason to find the slightest fault with it"; and the case was abandoned.

In a West Tennessee town, not a thousand miles from Union City, the capital of Obion County, there was a man whom I will call Rives who was raised by the votes of his friends to the dignity of a magistrate. He was a whole-souled, good-hearted fellow, not learned by any means, and while he loved his friends he loved his toddy better. In fact he had a "sorter" Tam O' Shanter fondness for the stuff, which has unfitted many an eminent jurist for his duty.

One day, soon after being elected, 'Squire Rives sat patiently for an hour listening to a very important case, and then his mind began to wander from his business to the saloon across the street. Through the opened window he could see the men standing around the groggery, while occasionally one of his friends would come from the door wiping his mouth with happy satisfaction. As the time passed the case lost all interest for the 'Squire, and after twisting around in his chair for awhile and being unable to stand it longer, he arose, reached for his hat, and turning, said affably to the attorneys:

"Well, you gentlemen go ahead with the examination of the witnesses, I will be back directly."

The lawyers constrained their mirth until the

justice had gotten clear of the court-room, then they sat down and laughed until he returned, wiping his mouth with his red bandanna.

In those days lived a portly and pompous man who held a commission as brigadier-general of militia, and a license to practise law,—neither of which he had much occasion to use

He finally found himself the proud enjoyer of a case in the Supreme Court, and fondly dreamed of seeing his name as counsel for the plaintiff, above a long and elaborate opinion, in the reports.

He was mightily disappointed and enraged when, during opinion day, he heard his case called and the simple announcement made from the bench, "Affirmed."

After adjournment he went to Judge McKinney, with whom he enjoyed personal acquaintance, and said: "Judge, I thought that the Supreme Court, at least, would obey the law."

"Wherein has the Supreme Court failed?" asked the judge.

"The law requires that a written opinion be delivered in every case this court tries, and none was delivered in the case of *Smith v. Brown*."

"Let us see about that. Mr. Marshal, please bring me the record in *Smith v. Brown*."

The judge took the rolled record, and glanced at the bottom of the outside page. Placing his finger upon the written but abbreviated "aff'd.," he said to the ambitious general: "See there! 'Aff'd.' Damn it, isn't that a written opinion?"

Having thus won his case he turned on his heel and contemptuously left the disappointed lawyer to his reflections.

It was during a session of the Superior Court held in Salem, Massachusetts, that an old lady, who had been notified to attend the case as a witness, was called upon the stand. It was the first time she had ever entered a court room, and she was very much confused, so when told to hold up her right hand and take the oath, she, misunderstanding the command, replied in a trembling voice, "Oh, sir, I can't."

"But you must, madam," insisted the judge.

"Well, if I must, I suppose I must;" and to the amazement and amusement of all present, there followed a volley of oaths that would have done credit to an old timer.

At the last annual meeting of the Colorado Bar Association, William Travis Jerome, of New York, who delivered the Annual Address, told, in the course of it, the following stories:

I went up to Litchfield County, in Connecticut, to attend a meeting of the University Club there, and was called on to speak of conditions in New York, and I said they were very bad, and I wanted to illustrate how blackmail was levied. This was a case that I had evolved entirely from my inner conscience. It was purely an imaginary one. I described how there was a shortage of lemons in New York, and how some merchant who had exceptional wisdom had cabled through London to Mediterranean ports and had secured freight for three or four thousand boxes of lemons on a fast steamer which came in twenty-four hours ahead of some of the slow steamers that were bringing lemons, and he was enabled to make by his foresight a dollar a box. He went up to the custom house to enter his goods, and when he went back on the wharf a fellow greeted him and said, "Are you Mr. So-and-so; are those your lemons?" "Yes," said the merchant. "I am the health inspector," said the man, "and I think those lemons will have to be hand-picked." Hand-picked meant thirty-six hours' delay, the incoming of the lemons on the other ships, the loss of his extra expenses, freight and everything. "What fixes it?" said the merchant. "Two hundred and fifty," said the inspector. "It goes," said the merchant. It was mere imagination, and yet so absolutely corrupt had become our public service that you could not imagine anything too bad. When I got back to the city next day a friend of mine, a fruit inspector, came into my chambers and sat around for awhile — it was after court adjourned — and finally he said, "I might as well have it out; the Health Commissioner sent me down to find out how you got onto that lemon story."

There was an old fellow up in my region by the name of Uncle Harvey. He was one of the shrewd old farmers up in that vicinity. There came along a bright, breezy young man selling incubators. There was not another such incubator to be found, according to his story, and he tackled Uncle Harvey on the subject one day, quoted his prices, *etc.* Uncle Harvey was very touchy to people he did not know, and

he didn't seem to respond very much, and as the time went by and the young man talked himself to a standstill, he finally said to Uncle Harvey, "You don't seem to appreciate these incubators." "No," said Uncle Harvey. "But," said the young man, "just think of the time they will save." "Well," said Uncle Harvey, "what the hell do I care for a hen's time?"

There was a gentleman who was chief chemist of the Board of Health in the City of New York and is now Health Commissioner — an honorable, noble man, none finer in this country. He had no power of determining what sums should be expended for particular articles or what the price should be. His functions were limited to putting in a request, and, when the bill was returned, to "O.K.'ing" it as to quantity and quality, but not as to price. It was of course put through one of those ordinary railroad construction supply companies, or something of that kind, in the City of New York, that supply everything from a needle to an anchor, and he had made a requisition for five pounds of sponges. It came in on the requisition, "five pounds of sponges." He was a conscientious fellow and he always took these different articles that came in, went through them himself and had them called out and checked by his clerk. He said, "John, where are those sponges?" John produced a lot of sponges and said, "Here they are, Doctor." He said, "There's no five pounds of sponges there; put them on the scales." They put them on the scales and they weighed just four ounces. A day or two afterward around came the agent of the railroad construction supply company. "Hello, Doc.," he said, "have you O. K.'d our bill?" "No," said the doctor, "you have either got to strike these sponges out or make good." "What's the matter with the sponges?" "Why," said he, "you have charged for five pounds while there is only four ounces." Pardon the language, but it is characteristic of the type of the individual — "Hell, Doctor," said the agent, "did you weigh them dry?"

You know there is always in a New England town some simple-minded gentleman, not much given to labor, one who would rather be following the horses and working in a ring at the county fair than anything else in the world; and there was one such in the town I have in



mind who was pretty shrewd at it. Old John used to go to church about twice a year. He got into church one day, more by accident than anything else, and it happened that the parson had turned his barrel over that week and struck the sermon he always preached once a year on the evils of gambling and horse-racing. After he had finished preaching and the meeting was over he approached John and said: "Well, John, I am glad to see you at church." "Thank you, Parson," said John. "John," said the Parson, "you have not been here lately." "No," said John, "it is nigh on to two years now since I have been here." "Well," said the parson, "if I had known you were going to be here I would not have preached that sermon." "Well, never mind, Parson," said John, "it must be a damn bad sermon that won't hit me somewhere."

LORD HERSCHELL, says "E. M." in *The Law Times*, "was a delightful companion both at home and in travel. He could be sociable in the midst of all his hard work. Like Sir Walter Scott, who wrote 'Marmion' and 'The Lady of the Lake' in the family circle, Herschell read his briefs at home in his smoking-room, and it never disturbed him to have people in the room conversing — indeed, it appeared to be rather a relief to him than otherwise, and he would lay down his papers and join in the conversation if anything caught his ear which interested him. He had a wonderful power of mastering unfamiliar subjects — witness the Currency Commission. The work of the commission was one of exceptional difficulty, and when Herschell accepted the presidency he was absolutely ignorant of the subject, but he went down to the country supplied with a goodly collection of Blue-books, pamphlets, and other literature bearing on the subject, and when he returned he was as well posted in all the points at issue as the best of his colleagues.

"His memory, says his friend Mr. Williamson, was astonishing; he hardly ever made a note, and yet, though the most unmethodical of men, he never was at fault. In travelling he never kept an account, but when it came to a periodical settlement with his fellow travellers he would accurately remember every payment he had made two or three days before, even to the smallest

sums paid to a porter or sacristan. In truth, his wonderful memory sometimes proved a snare, and certainly was a matter of despair to his private secretaries, who would receive indignant letters asking why some previous communication had not been answered. The secretary had never seen it, but on reference to Herschell he would clearly remember the subject-matter of the missing document, which eventually would be unearthed from the recesses of the pockets of his coat, and which he had opened himself, but had omitted to pass on to his secretary to be disposed of. It was the regular practice of his confidential clerk, when Herschell was at the Bar, to clear out on Saturday afternoons the pockets of his court coat. He generally found there numerous letters, sometimes of great importance, often containing cheques in payment of fees.

"One of his pet aversions was the action for breach of promise of marriage — treating a woman like a 'bale of wool.' It profaned marriage, and was, in his view, an abuse of the process of the court — a form of law-licensed blackmailing without even antiquity to commend it, for the action dates only back to Charles I. Accordingly nearly every year he brought in a Bill to abolish the action, or at all events to limit the damages, as in Austria and Holland, to actual pecuniary loss sustained, such as the lady's trousseau or the wedding-cake."

#### LITERARY NOTES.

UNDER the title of *Lee at Appomattox, and Other Papers*<sup>1</sup> have been collected five addresses by Charles Francis Adams, delivered before several historical societies. Of most permanent historic value, probably, is the paper on the Treaty of Washington, which fills half the volume. Just and discriminating is the high tribute paid to the patriotism and wisdom of General Robert E. Lee in accepting defeat and refusing to wage irregular warfare after Appomattox. Interesting and delightfully frank is Mr. Adams' explanation of "A National Change of Heart" — the changed attitude of England's governing classes toward the United States; this change coming partly from the recognition by those classes of our commercial success, of

<sup>1</sup> LEE AT APPOMATTOX, AND OTHER PAPERS. By Charles Francis Adams. Boston: Houghton, Mifflin and Company. 1902. Cloth: \$1.50, net. (387 pp.)

the successful solving of the momentous political questions created by the Civil war, and of our naval success in the Spanish war, and partly from the disappearance from ourselves of a certain national crudeness.

To our mind, however, the most pregnant address is that entitled "An Undeveloped Function,"—in other words, the absence—except in the slavery debates—of scholarly discussion of our political questions. The need of such scholarly discussion is insisted upon; its absence "is in greatest part due to the fact that the work of discussion has been left almost wholly to the professional journalist and the professional politician." In this paper Mr. Adams is at his best; his review of our presidential canvasses and great national debates is clear and caustic; his discussion of the three issues of the campaign of 1900—"Imperialism," "Trusts," and the silver issue—is an excellent example of that for which Mr. Adams pleads—the discussion of political questions "in the pure historic spirit." There is one half-page, on the subjugation of one people by another, which sums up in a masterly way the whole Philippine question. "Where," says Mr. Adams, "a race has in itself, whether implanted there by nature or as the result of education, the elevating instinct and energy,—the capacity of mastership,—a state of dependency will tend to educate that capacity out of existence; and the more beneficent, paternal and protecting the guardian power is, the more pernicious its influence becomes. In such cases, the course most beneficial in the end to the dependency, now as a century ago, would be that characterized by 'a wise and salutary neglect.' Where, however, a race is for any reason not possessed of the self-innate saving capacity,—being stationary or decadent,—a state of dependency, while it may improve material conditions, tends yet further to deteriorate the spirit and to diminish the capacity of self-government: if severe, it brutalizes; if kindly, it enervates. History records no instance in which it develops and strengthens." Wise words for imperialists to ponder over!

EIGHT papers by Captain Mahan, on naval and political international relations, printed in various magazines during the past year, have been reprinted in a volume entitled *Retrospect*

and *Prospect*.<sup>1</sup> It is hard to think of Captain Mahan as other than a thorough-going imperialist; yet he assures us, in the article which gives its title to this volume, that up to 1885 he was "traditionally an anti-imperialist." Certainly his conversion has been thorough. Besides containing an excellent paper on Admiral Sampson and a familiar plea for a great navy, this volume contains two rather technical articles on "Considerations Governing the Disposition of Navies" and on "The Military Rule of Obedience"; one article on the South African war, which Captain Mahan believes "to have strengthened materially the British Empire"; and two articles in "the broad field of world policies" on the "Motive to Imperial Federation" and on "The Persian Gulf and International Relations."

#### NEW LAW BOOKS.

ENGLISH RULING CASES. Edited by *Robert Campbell*. With American Notes by *Irving Browne* and *Leonard A. Jones*. Vol. xxvi. Index and Table of Cases by *Edward Manson* and *John M. Gould*. Boston: The Boston Book Co. 1902. (vii. + 773 pp.)

One of the results of study in a law school using the case system is that the lawyer finds himself unable to read with comfort the average treatise. When he comes upon a general statement, he wonders whether the citations sustain it; and, in truth, he has good cause for scepticism. Even when he believes the general statement to be correct, he wishes a concrete example and a discussion of doubtful problems. Probably there will arise a race of text-book writers meeting this new demand. Meanwhile, the place is fairly filled by the series of *English Ruling Cases*. The text, covering twenty-five volumes of average size, gives several thousand cases in full, reprinting the original statements, the arguments of counsel, and the opinions. Thus the reader gets a vivid perception of the facts, and of the mode in which the questions of law arose, and of the general principles that were applied; and he gets, also, at least very frequently, an enlightening discussion by the judge. In the foot-

<sup>1</sup> RETROSPECT AND PROSPECT. Studies in International Relations, Naval and Political. By *A. T. Mahan*, D.C.L., LL.D. Boston: Little, Brown and Company. 1902. Cloth: \$1.60, net. (x + 309 pp.)

notes are stated almost all the pertinent English cases, and a great number of cases from the United States; and, besides, there are countless references to treatises. As the authorities are carefully classified, the person who wishes systematic reading finds it easy to follow again the subjects of his law school course, or—better still—to go into new fields. The index volume that now completes this valuable series enables the practitioner to turn promptly to the very authority that he needs.

---

REPORT OF SPECIAL AND REGULAR MEETINGS  
OF THE COLORADO BAR ASSOCIATION. VOL-  
UME 5. 1902.

THE proceedings of the fifth annual meeting of the Colorado Bar Association, held in July, 1902, have been published in the volume before us. Of more than local interest is the address of Edward T. Taylor on "The Torrens System of Registering Title to Land," which gives, in addition to a brief historical sketch of the system, a statement of the legislation of this nature which has been enacted in the various States and a review of the cases to which such statutes have given rise. The volume contains also the address of the retiring president of the association, Platt Rogers, the annual address by William Travis Jerome, of New York, and three addresses on the proposed Australasian Tax Amendment, by which any county might exempt from all taxation—except a State tax—"any or all personal property and improvements on land."

---

OUTLINES OF CRIMINAL LAW. Based on Lec-  
tures delivered in the University of Cam-  
bridge. By *Courtney Stanhope Kenny, LL.D.*  
Cambridge: University Press. 1902. Cloth:  
\$2.50. (xxii + 528 pp.)

Early in the year we had occasion to review the *Selection of Cases Illustrative of English Criminal Law* by the University Reader in English Law at Cambridge. That earlier volume may well be used in connection with the book before us, many of the references in which are to the *Selection of Cases*.

It is seldom that a legal text-book is readable. Yet the *Outlines of Criminal Law* has in a marked degree that quality,—an admirable

quality, if it be achieved without sacrifice of accuracy of legal statement. In the present instance there seems to be no such sacrifice. Another commendable feature of this treatise is that the author has shown rare judgment in not overloading with citations either his pages or his foot-notes. It seems not improbable that the good qualities which we have noted would be found more frequently in text-books if legal writers would exercise the self-restraint of the present author, and would refrain from giving their works to the press until ripe with the experience of a quarter of a century; the *Outlines of Criminal Law* embodying, in substance, lectures delivered at the University during the period mentioned.

Besides dealing with the general considerations of this branch of the law and with particular crimes, the author devotes part of his volume to criminal procedure and to the elements of Evidence.

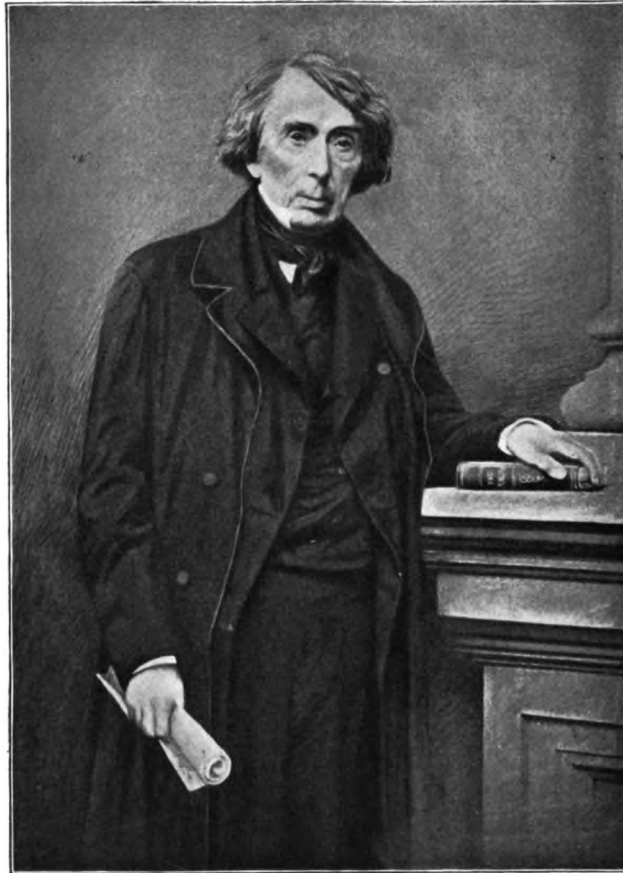
---

THE AMERICAN STATE REPORTS. Vol. 85. Con-  
taining cases of general value and authority,  
decided in courts of last resort of the several  
States. Selected, reported and annotated by  
*A. C. Freeman*. San Francisco: Bancroft-  
Whitney Company. 1902. (1053 pp.)

The cases in this volume are from the following recent reports: Alabama 126, 127; California 133; Illinois 191, 192; Maine 95; Minnesota 83; Missouri 162, 163; New Hampshire 70; New York 168; North Carolina 129; Pennsylvania State 199; South Carolina 60, 61; Washington 24. The leading monographic notes are on "Elements of Damage allowable in proceedings in the exercise of the Power of Eminent Domain"; "Jurisdiction of Foreign Corporations"; "Conflict of Laws as affecting the Rights and Obligations of Married Women"; "Liability for Misrepresentations indirectly made to the Complainant Party"; "Right of a Person accused of Crime to a Speedy Trial"; "What Words or Phrases may constitute a Valid Trade-mark"; "Right of one Land Owner to accelerate or diminish the Flow of Water to or from the Lands of Another."

The publishers have issued, for presentation to the patrons of this series of Reports, a brief Digest to Volumes 79–84, including a Table of Cases and an Index to Notes.





CHIEF JUSTICE TANEY.

# The Green Bag.

VOL. XIV. No. 12.

BOSTON.

DECEMBER, 1902.

## CHIEF JUSTICE TANEY.

By HON. JOHN A. SHAUCK,

*Chief Justice of the Supreme Court of Ohio.*

FROM the point of present retrospect, the appointment of Roger B. Taney to the place on the bench of the Supreme Court left vacant by the death of Chief Justice Marshall seems to have been most natural. He was a man of dignified and lofty character. He was distinguished for intellectual vigor. An eminent contemporary spoke of him as the man "of moonlight mind. The moonlight of the Arctics with all the light of day, without its glare." He had won and long held a place among the foremost lawyers of the nation. He had discharged the duties of attorney-general of his state and of the United States with an ability and fidelity which were known to all men. He had cordially supported the President in his dramatic assault upon the nullification scheme of South Carolina, though he did not approve of all of what was called the "centralization doctrine" of the proclamation issued upon that occasion. A few months before one of the associate justices, who was a firm adherent to the national theory of construction, resigned his seat, but only after becoming satisfied that Taney would be appointed in his stead. His nomination was sent to the Senate. Among the papers of one who at the time was a member of the Senate was afterward found a note from Chief Justice Marshall, expressive of a desire that the nomination should be confirmed. It was indef-

nitely postponed. But the Senate was still engaged in the controversy over the United States bank, and its action with respect to the nomination did not imply an adverse judgment regarding either the character or the abilities of the nominee. The considerations which most favorably commended him to the President operated conclusively against him with a majority of the senators and with the people who agreed with them respecting the propriety of continuing the bank. The Senate did not overestimate the importance of his influence in the overthrow of that institution. Even the great talents of Calhoun were devoted to his denunciation. Mr. Webster sneered at him as "the pliant tool of the President." For that sneer there was no excuse. He had been an active opponent of the bank before entering the cabinet as attorney-general. His addresses and papers concerning it show that if his opposition was expressed less vehemently than was that of the President, it was placed upon grounds which indicated a much clearer conception of the reasons involved. Being convinced that the continuance of the bank would be a public detriment, he struggled unremittingly for its overthrow. He stood alone in the cabinet in advising the veto of a bill to recharter it. When the Secretary of the Treasury refused to make the order to withhold further deposits from the bank, he consented to be

transferred to that department in order that his favorite policy might be executed. One who should now attempt to demonstrate that his view of the subject was wrong would set himself to a hard task. But right or wrong, his adherence to his convictions was admirable.

Sore financial distress followed the suspension of the bank, and its friends were able easily to persuade themselves that the suspension and the distress sustained the relation of cause and effect. An important phase of the controversy was the relation of the bank to the currency of the country. Those of us who are politically descended from Judge Taney's critics should feel much inclined to him because of the reason which chiefly prompted his course. It was stated by himself in a sentiment sent to a meeting called to celebrate the death of the bank: "The gold coins—long exiled from our country for the benefit of the few—they are now returning for the benefit of the many." On December 28, 1835, when his brow bore the palms of victory, and the anathemas of the friends of the bank, he came to the office of Chief Justice. A change had occurred in the political complexion of the Senate, and his nomination was confirmed. Cases involving questions of federal power which had been left undecided in the time of Marshall soon came on for reargument. The conclusions reached by a majority of the court denied the alleged federal authority involved. One does not affect superior wisdom in saying that the conclusions reached were wrong, for they have been completely discredited by the decisions and practice of the last forty years. Attempts to reconcile them with former decisions of the court were not successful. In those decisions the new Chief Justice concurred, but there is no reason for the view that they were made under his leadership. That he was never so influential in the court

with respect to constitutional questions as his predecessor had been, is made manifest by the numerous differences of opinion among the members of the court upon such questions, and especially by those in which his views were shared by only a minority. Indeed, the reports of these cases do not show that the decisions would have been different if his vote and influence had been for a different result. One of these decisions, involving the exclusive power of congress to regulate foreign and inter-state commerce, was practically overruled about ten years later, but without the concurrence of the Chief Justice and contrary to his view.

Although the national authority was in many respects fully asserted in the decisions of this period, it was in others obviously and illogically relaxed. Former decisions were not overruled, nor were their doctrines expressly rejected. Indeed, they were referred to in terms of great respect, but they were not always applied to new cases to which they were logically applicable, and doctrines inconsistent with them were declared.

There was an illustration of the universal law of such cases that decisions in which correct principles are applied are but an ineffectual antidote to those relating to the same general subject in which correct principles are rejected. Upon a comprehensive view of the situation a reaction from the tendencies toward nationalism, which had appeared in the decisions of the preceding period, was manifest. There was rejoicing or despondency in the hearts of those who had respectively hoped for the weakness and the strength of the general government as the result of the interpretation of the instrument by which its powers had been conferred. To the clear vision of Story a portentous cloud had gathered, though it was not larger than a man's hand. With splendid intellect, vast learning and abounding

patriotism he had carried over to this period the traditions and doctrines of the court's golden age. In two of these cases in which the reactionary tendency is most manifest, he dissented for reasons so convincing that it is difficult to see how the conclusions of the majority could have been reached, and in terms which plainly suggest his veneration for the memory of the fallen chief by whose luminous reasoning he had been led from the narrow opinions of his youth to an adequate comprehension of the meaning of the constitution and the vast purposes for which it was adopted.

Not only did the members of the court in this period profess the highest respect for the great opinions from whose doctrines they were departing, but most of them appeared to be unconscious of the departure. Nor can there be found in the opinions of more than two of them indications of the least hostility to the general government or a reluctance to accord to it the powers which they believed had been granted by the terms of the constitution, even if regarded in the light of the circumstances attending its adoption. With respect to questions of this character, the attitude and opinions of Judge Taney show the most reverent attitude and the highest appreciation of their gravity. While questions of this character did not evoke his greatest powers, they did not fail to enlist his conscientious care to the end that correct principles might be applied and maintained. His ability for the mastery of the other subjects embraced in the vast jurisdiction of the court was conspicuous, even among the eminent men by whom he was surrounded. That he was free from prejudice against what he believed to be legitimate federal power, is shown by cases in which he aided in extending it beyond the limits which some of his associates thought proper. So admirable was his bearing, and

so marked with propriety was his conduct in his great office that in twenty years from his accession he was held in general esteem which amounted nearly to veneration. Even those who most deplored the reactionary tendency of the court with respect to questions of governmental power, bore testimony to his personal worth and his general ability. Story, so filled with forebodings regarding the calamitous consequences which he feared from those reactions that his friends could with difficulty restrain him from quitting the bench, never wearied of affirming his respect for the character and abilities of the Chief Justice. Those who had assailed him most bitterly in the exciting conditions of his accession substituted praise for censure, though not ceasing to deplore the aid he had given to those decisions which indicated the reaction. On the 31st of January, 1851, Senator Seward asked permission to inscribe to him a speech which he had made on the subject of the French spoliations. The request was made for the two reasons that the cause would be aided by the public knowledge that it had the sympathy of the Chief Justice, and, to use the words of Mr. Seward: "It would be an expression of the high regard which in common with the whole American people I entertain for you as the head of the judiciary department."

In the meantime the agricultural development of the South had gradually increased the value of property in slaves, and the belief that slavery is wrong, which had been universal among the fathers, became sectional. That vanishing virtue, love of the union, had grown and waned in the hearts of many as the existence of the union and the maintenance of its powers had favored or opposed their desires or interests. The indifference or hostility which had previously appeared among those who uttered or applauded the sentiment that "The constitution is a cove-



nant with death and a league with hell," and those who met, or were represented, in the Hartford convention, now shifted to the South because of the anticipated preponderance of free states in the union.

When the national and confederative theories of construction were formulated and placed in opposition they did not in any manner concern the subject of slavery. All then believed and desired that the institution would be placed in the course of ultimate extinction. Indeed, the statesman who contributed more than any other to the development of the confederative theory was more consistent in his opposition to slavery than with reference to any other subject. In the time of the reaction neither the decisions referred to nor the opinions of the court or the judges implied any belief or desire with respect to slavery. When the controversy concerning slavery arose and became fierce, its advocates adopted the previously formulated confederative theory because as they thought, in view of the anticipated preponderance of free states, a limitation of federal powers favored slavery by rendering it more secure. By adopting that view they obviously hastened its doom.

For more than twenty years after his accession Judge Taney held his way with such dignity and propriety as to disarm criticism. The aid which he gave to the narrow view taken of the powers of the general government was neither intended nor supposed to be in aid of slavery. He did not attract the attention of those whose feelings were aroused with reference to that subject, and those who comprehended the tendency of the reactionary decisions were a few seers who paid to conscience the appropriate tribute of toleration.

And then came the decision of the Supreme Court of the United States in *Scott v. Sanford*, famed as the *Dred Scott* case.

In the excitement of the times it would hardly have been possible to determine the case upon any of the grounds considered without disturbing the public tranquillity. Its effect was much intensified by the comprehensive character of the opinion of the Chief Justice and by the determination of questions which were obviously not necessary to the determination of the rights of the parties. A brief statement of the case will show at once how unnecessary to a decision of the case was the decision of some of the questions embraced in the opinion and how utterly baseless was much of the criticism which the case evoked. *Dred Scott*, a Negro, brought suit in the courts of Missouri for his freedom, admitting that he had been lawfully held as a slave, but claiming that his right to freedom had resulted from his having been taken by his master to reside first in the State of Illinois, where slavery was prohibited by the local law, and later to Fort Snelling, situate in the territory then known as Upper Louisiana, acquired by the United States from France, and north of the latitude 36° and 30' north, and not embraced within the State of Missouri, in which territory slavery was prohibited by the Act of Congress of 1820, known as the Compromise Act. The decision of the supreme court of the State of Missouri was against Scott's claim to freedom. He then instituted a suit in the circuit court of the United States for the District of Missouri for the same purpose, alleging as the ground of jurisdiction of that court that he was a citizen of Missouri and the defendant a citizen of New York. To the diversity of citizenship necessary to give the federal court jurisdiction, the citizenship of Scott was of course indispensable. On a plea of the defendant raising that question the circuit court decided in favor of Scott's citizenship and its own jurisdiction. Proceeding then to the merits of the

case it followed the supreme court of the State in deciding that Scott was not entitled to freedom. Scott then took the case by writ of error to the Supreme Court of the United States, where the opinion of the majority was delivered by the Chief Justice. The general conclusions reached in the opinion were: "1. A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a citizen within the meaning of the constitution of the United States. 2. The clause in the constitution authorizing congress to make all needful rules and regulations for the government of the territory and other property of the United States, applies only to territory within the chartered limits of some one of the States when they were colonies of Great Britain, and which was surrendered by the British government to the federation of the States in the treaty of peace. It does not apply to territory acquired by the present federal government by treaty or conquest from a foreign nation. 3. The constitution of the United States recognizes slaves as property and pledges the federal government to protect it, and congress cannot exercise any more authority over property of that description, than it may constitutionally exercise over property of any other kind. 4. The plaintiff acquired no title to freedom by being taken by his owner to Rock Island, Illinois, and brought back to Missouri, because his status or condition as a person of African descent depended on the laws of the State in which he resided, and it had been settled by the decision of the highest court in Missouri that by the laws of that State a slave does not become entitled to his freedom where the owner takes him to reside in a State where slavery is not permitted and afterward brings him back to Missouri."

In view of the wide range of the opinion and the number and character of the sub-

jects covered, the Chief Justice's own statement of the questions presented is interesting, for it gave tremendous force to such temperate criticism as the opinion received. He said: "There are two leading questions presented by the record. 1. Had the circuit court of the United States jurisdiction to hear and determine the case between the parties? 2. If it had jurisdiction, is the judgment it has given erroneous or not?" Naturally enough this was taken as an admission that when the court reached the conclusion that Scott was not a citizen and that the circuit court was, therefore, without jurisdiction to determine the case between the parties, no other question properly remained for consideration. With respect to the citizenship of Scott the opinion contained much learning gathered from English history and adjudications to show the status of the negro in the civilization at the time of the adoption of our constitution and anterior thereto, and a careful analysis of much legislation by congress, by the colonies and by the States, to support the conclusion reached, that Scott, because of his blood and ancestry, was not a citizen, and that the circuit court was, therefore, without jurisdiction to determine the case between the parties. Having reached that conclusion, the Chief Justice evidently realized that some reason of a juridical character was necessary to justify the court in passing upon questions which the circuit court had not authority to determine. The view by which he attempted to justify that course must have seemed strange then, for it had never been advanced before. It seems scarcely less strange now, for it has never been advanced since. But he satisfied himself with the reasons given for considering Scott's claimed right to freedom for himself and family because of the residence with their former master at Fort Snelling, and he proceeded to consider it. Their right to

freedom on account of that residence was denied because, as he concluded, slavery was not prohibited there by any valid law, that the provision of the compromise act of 1820, prohibiting slavery in the territories north of latitude 36° and 30' north, and not included within the State of Missouri, was in excess of the power conferred upon congress. The act had been supposed to be authorized by the grant to congress of the power "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States." He concluded, however, that a distinction should be drawn between the territory belonging to the United States when the constitution was adopted and that which it acquired subsequently, and that the power conferred did not include territory subsequently acquired. The distinction could not be sustained by reason, for it placed an important limitation upon an unlimited grant of power. It was a departure from views universally entertained and practised since the first acquisition of territory. It was in direct conflict with the former decision of the same court that territory acquired from Spain after the adoption of the constitution was within this grant of power. It was expressly disclaimed by one of the concurring justices. It was in the dissenting opinion shown to be untenable, and it has been consistently repudiated throughout the forty-five years of our subsequent history. The decision against the validity of the prohibitory provision of the compromise act did not aid in determining the rights of the parties before the court, for the residence for more than a year at Rock Island, Illinois, was an admitted fact, and in Illinois, slavery was prohibited by enactments whose validity no one questioned. To the claim for freedom on account of that residence the answer of the Chief Justice was that the plaintiff's status was fixed by the laws of Missouri, not by

those of Illinois, and that the decision of the courts of Missouri adverse to the claim was final. The insufficiency of that answer has never been made apparent, but if it was sufficient with respect to the residence at Rock Island, it was obvious to all that it was equally so with respect to the residence at Fort Snelling.

The decision had unfortunate and exciting incidents. The controversy concerning slavery was rapidly approaching its climax, and political zeal, combined with religious fervor, stirred resentment against a decision which was believed to indicate that in that great controversy the court had taken the side of slavery. In the concurring opinion of one of the justices a desire to allay the public excitement was practically admitted. In the opinion of another a desire to avert a preponderance of the free States was but thinly disguised, if disguised at all. The decision was announced on the 7th of March, 1857. But three days before Mr. Buchanan had entered upon his term as President, and he was so indiscreet as to say in his inaugural address that a case was then pending in the Supreme Court whose decision might aid in staying the gathering storm. The denunciation which was hurled at the court, and especially at the Chief Justice, is historic. Now and then there appeared among his critics some Abraham Lincoln who, without defaming his character, could mercilessly assail his opinion for the want of logical and legal relation among its parts. But most of the criticism was highly denunciatory. Anti-slavery editors and orators filled the northern States with the charge that Judge Taney had officially declared that negroes "had no rights which white men were bound to respect," and the people were taught to believe that one of the kindest and most philanthropic of men was a brute. The words were indeed quoted from his opinion, but so

severed from their connection and perverted in their meaning that the imputation was utterly unjust and substantially false. The paragraph in which the words occur shows at once the injustice of the accusation and the character of the reasoning in which he indulged to show that Scott was not a citizen, as citizenship was understood when the constitution was adopted. Speaking of the African race he said: "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion." A few days later the Senate chamber was the scene of an exhibition of partisanship to which happily we have not become accustomed. A Senator with glowing rhetoric affirmed that before coming into office the President had approached, or was approached by, the Supreme Court of the United States, insinuated that this case was on the docket by chance or design, that it had been submitted to the court upon an admission of facts which were unsusceptible of proof, that counsel representing the plaintiff were ignorant of the purposes of the case, that its discussion was

a mock debate, that a bargain was consummated between the Chief Justice and the incoming President in the whispered conversation which occurred at the time of the inaugural ceremonies. The effect of this decision and the manner in which it was discussed in the fervid oratory of the times was pronounced and unfortunate.

Within eight years from the announcement of the decision, the subject of the controversy with which it was so closely connected was destroyed by fire. In the years which have since passed, time has performed its beneficent office of allaying bitterness and securing a general acceptance of the obvious truth. Some general observations respecting the Dred Scott case now command nearly universal assent. The conclusion of the Chief Justice that a negro was not a citizen in the civilization of a century and a quarter ago was sustained by much reason, and the dissenting opinions, able though they were, did not amount to a demonstration of its unsoundness. So the conclusion that Scott's status as free man or slave, was fixed by the laws of Missouri, and that his claim to freedom was concluded by the adverse decision of the Supreme Court of that State, was strongly supported by reason and authority. Either of these grounds being taken, a decision leaving Scott in slavery was inevitable, and it cannot be said with confidence that upon the main question the conclusion of the court was wrong in any other sense than that laws which sanctioned slavery were wrong. There was no juridical reason for considering the constitutional validity of the compromise of 1820. Having entered upon its consideration, the Chief Justice failed in his attempted distinction between territory owned by the United States when the constitution was adopted and that which was acquired subsequently. He not only failed in his attempt

to draw support for his conclusion from the previous decision in the Florida case, but he was not able to reconcile his view with that case. The opinions in the case and subsequent statements made by the judges, authorize the conclusion that the court attempted that which is always perilous, namely, to do more than to determine the rights of the parties. Upon a previous argument a conclusion had been reached adverse to the plaintiff's right to freedom. An opinion was then prepared by a member of the court, placing the denial of the right upon the conclusiveness of the adverse judgment of the state court. It finally appeared as the separate opinion of Mr. Justice Nelson. But before the announcement of the decision the suggestion prevailed that the case should be re-argued and the decision placed upon the ground finally announced by the Chief Justice. The court supposed it could thus aid in allaying the excitement respecting slavery. The sequel followed rapidly, and it became certain that a barrier of straw had been set against the spread of a conflagration. That Judge Taney and those who acted with him did not appreciate the tremendous forces which were forming for the overthrow of slavery, is clear. Who did? In the face of the criticism and condemnation which came upon him from the North he bore himself with admirable dignity and propriety, neither retorting upon his critics nor encouraging his friends to do so. That he was not indifferent to such criticism was shown by his filing a supplement to his opinion about two years later, exhibiting much research in English history and judicial decisions, to show that he had not erred in his definition of citizenship. But the supplement availed nothing, for it did not support the original opinion at the point of its most obvious weakness.

In 1858 the court was called upon to re-

verse a judgment of the Supreme Court of Wisconsin by which that court had attempted to release one under sentence of a federal court upon conviction of a violation of the fugitive slave law, the state court being of the opinion that the law was unconstitutional. The judgment was of course reversed, and the opinion of the Chief Justice was admirable for the clearness and vigor with which it upheld federal authority, and affirmed the duty of the Supreme Court of the United States to shield it from invasion by the States. Indeed, the opinion sounds like an echo of Marshall's great opinion, delivered forty years earlier, promulgating the same doctrine. But his critics were implacable. Indeed, they affirmed that the Chief Justice, at other times unable to recognize federal power, was quick to assert it in the interest of slavery. They even made the baseless criticism that the conclusion was inconsistent with the decision in the Dred Scott case, because if congress could not by legislation fix the status of a black man in a territory, much less could it do so in a State. This criticism, of course, gave no heed to the provision of the constitution with respect to the reclamation of fugitives from labor. Such was the effect of four years of intemperate criticisms of the Chief Justice upon the already excited people who made and heard them, that there was general expectation as the fourth of March, 1861, approached, that he would refuse to administer the oath of office to Mr. Lincoln. For that expectation there was an obvious reason. Such refusal would be consistent with the unreal character with which his critics had invested him.

Judge Taney was now more than eighty years old, but another visitation of public wrath lay between him and the close of his career. After the opening of the civil war a petition was presented to him on behalf of

a citizen of Baltimore, alleging that he was imprisoned in Fort McHenry, without warrant and in violation of law, and praying for a writ of *habeas corpus* to the end that he might be restored to liberty. The writ was issued and served upon the military officer in command. That officer declined to surrender the petitioner, but made a return to the Chief Justice which in most respectful language stated the grounds of his refusal, the essential portion of it being that the President had authorized him to suspend the privilege of the writ of *habeas corpus*. The petitioner not having been delivered, nor a sufficient reason given for the refusal, an attachment for the officer was ordered. The attachment could not be served because the marshal was unable to enter the fort, and he made return accordingly. Judge Taney, recognizing the inability of the marshal to enforce the writ against the obviously superior military force, made no further effort in that direction. But, being unwilling to give apparent assent to a doctrine which had not been recognized in our jurisprudence since the subserviency of an English court had permitted the historic outrage upon the rights of John Hampden, two centuries before, he filed an opinion in which, with much learning and clearness, he showed that legislative action is indispensable to the suspension of the privilege of the writ, that it is not an executive discretion, and that if it were, the President could not transfer it to a subordinate. By that courageous and convincing assertion of the rights of freemen, Judge Taney established his title to the gratitude of the last generation of men who may be permitted to enjoy constitutional liberty. What was the answer to his uncontrovertible exposition of the law? Nothing but a maxim: "amid arms the laws are silent." In times of great excitement those who imagine themselves to be superior to all others in love of

justice and liberty, lose all appreciation of the means which in the established order are indispensable to their security. It was so in this case. The critics of the Chief Justice were now a majority of those who supported the government. His fine courage and devotion to duty were invisible to their eyes. They would recognize no motive to his conduct except an imagined hostility to the government. Vials of wrath were poured upon his dying head.

Two members of the court who had aided in the reactionary decisions and in the Dred Scott case — one of them being more responsible than he for the scope of the opinion — were citizens of seceding States and in office at the beginning of the civil war. They adhered to the government and attempted to continue in the discharge of their duties in the circuit court, notwithstanding the action of their State. Another, who contributed more than did the Chief Justice to the reaction, became a prominent anti-slavery candidate for President. These were all pardoned and praised by those who had no words but of censure for Judge Taney.

Perhaps no other man was ever so misjudged with so little reason. Of the eighty-seven years of his life, twenty-seven were devoted to the duties of a station in which his conduct is shown by enduring records, and nearly forty years were devoted to the discharge of professional duties which were more than ordinarily conspicuous. An examination of reliable sources of information will overthrow opinions which were long held respecting him. He was never a believer in slavery. The slaves who came to him in his youth upon the death of his father he promptly manumitted, and those who were infirm with age he supported while they lived. Throughout his professional life his services were available to blacks who claimed freedom, and to persons charged with viola-

tion of the fugitive slave law or with unlawfully exciting slaves to insurrection. Upon the trial of a case of that character in the court of a State which sanctioned slavery, and in the presence of the jury he said: "A hard necessity indeed compels us to endure the evil of slavery for a time. It was imposed upon us by another nation while we were yet in a state of colonial vassalage. It cannot be easily or suddenly removed, yet while it continues it is a blot on our national character; and every real lover of freedom confidently hopes that it will effectually, though it must be gradually, wiped away, and earnestly looks for the means by which this necessary object may be best attained." From that position he never receded. He was never a believer in secession, nor did he ever by word or act give it intended encouragement. The consistent course of his life is marked by two conspicuous and widely separated objects, the thwarting of the nullification scheme of South Carolina, and the overthrow of a like scheme set on foot by the Supreme Court of Wisconsin.

His conduct was never controlled by the dictate of person or party. In early life he was a federalist. He acted with that party in opposing the declaration of war against Great Britain in 1812, but cordially supported the government after the war was declared. On conspicuous occasions he opposed and thwarted improper schemes of his party to acquire political control of his State. His last professional service, rendered just before he became chief justice and without reward or hope of it, was in obtaining the indemnification of political adversaries for property destroyed by a mob composed of men belonging to his party.

The twenty-seven years of his judicial service began when he was sixty years old, when he had probably experienced some hardening of previously formed opinions and

some loss of adaptability to strange duties. It is not now easy to understand how impartial and duty-loving men, such as he and nearly all of his associates undoubtedly were, could fail in the comprehension of the national doctrines which had been so clearly defined, and which were so conclusively shown to be necessary to the accomplishment of the purposes for which the constitution was adopted. This is especially true of the doctrines with respect to the power of congress to regulate foreign and interstate commerce. While the great benefits to result from unrestricted commercial intercourse, which the national theory favored, had not then received the marvelous illustrations which we now see, the consequences of the confederative theory had been plainly exemplified in State policies by which commerce had been crippled at every turn in the days of the Confederation. It was notorious that the desire to end the commercial strife which already existed and to avert the state of actual warfare which commercial rivalries threatened was the most powerful of all incentives to the adoption of the constitution. Most of Judge Taney's departures from former doctrines related to this general subject, and with respect to it his opinions are plainly foreshadowed by the doctrines which, as one of the counsel, he had vainly urged upon the court in *Brown v. Maryland*. It is said that even to this day lawyers of ability and high standing refuse to abandon their deliberately formed convictions, notwithstanding the adverse conclusions of courts.

There was no substantial reason why he should be measured by a standard not applied to his associates, but it seemed inevitable that he should be compared with another rather than with them. It is true that in the departments of constitutional and international law he did not reach the stature of

his colossal predecessor ; but the observation justifies no important inference, for it would have been true of any man of his generation who might have been chosen for the place. But in the causes whose determination chiefly occupied the attention of the court, in which the body of our jurisprudence has been developed and applied, public policies maintained and private rights enforced, and to which public attention is seldom directed, he was the equal of any of the eminent men who have occupied the office of Chief Justice. Transcendent abilities elicit our admiration, but they should not be regarded as indispensable to our highest respect. The biographer who is to place Judge Taney in his rightful position before the whole people will have an important, but easy, task. He will address

minds now happily released from the influence of those exciting and angry controversies which made charitable and even just opinions of adversaries impossible. He will exercise the tolerance of opinion which he will claim for his subject. He will invoke the guidance of the truth, and follow where it leads. His materials will be abundant. By their use he will be able to exhibit a long public career of devotion and rectitude, and a private life attractive for its simplicity and philanthropy; and he will aid in establishing the conclusion, consistent with the truth and promotive of a just national pride, that among the eight who have occupied the exalted station of Chief Justice of the United States since the foundation of the government, there is not a dishonored nor an unworthy name.

## QUALIFICATIONS.

By DOUGLAS MALLOCH.

I WOULD like to know nothing just for awhile,  
And quit all this working and scheming,  
Just to sit all day with an idiot's smile  
With naught to employ me but dreaming.

I would like to know nothing just for a time,  
And cease this mad struggle for money ;  
I would like to forget even reason and rhyme  
And have all my sorrows seem funny.

I would like to know nothing just for a day,  
With nothing to trouble or worry,  
And if all my senses should vanish away  
Perhaps I could sit on a jury.



## A WORD MORE AS TO THE COAL MINES.

BY H. W. CHAPLIN.

THE writer has been asked by the editor of THE GREEN BAG to contribute a brief article to the discussion that has arisen, as to the rights of the public in connection with industries of vital public importance, referring particularly to the coal strike of the past summer. The subject has lost most of its immediate interest for the general reader through the adoption of the arbitration plan and the resumption of mining. But the question of legal rights and remedies which is involved, is one of such importance, and suggests such far reaching possibilities for the future, that the removal of any occasion for the immediate assertion of the public rights through the courts, may not greatly diminish the interest of lawyers in the legal question. The writer's views on the matter have already been stated at some length in a pamphlet recently published, from which copious extracts were made in a review in the October number of this magazine. It is hardly worth while to rehearse here the considerations which were there presented, and the present article will be confined to certain questions which have been raised by critics, in discussing the views presented in the pamphlet.

Mr. Bruce Wyman, in an article in the last number of THE GREEN BAG, took issue with the writer on the fundamental question whether or not the business of mining anthracite coal, as now conducted in Pennsylvania, is a public calling in the legal sense. But a careful reading of Mr. Wyman's article, aside from the bare conclusion reached, seems to disclose very little difference of opinion.

Mr. Wyman points out the rather obvious fact that some employments are, and some are not, held by the courts to be subject to the law

of public callings; and he suggests the further fact that many employments which have not been and are not likely to be brought within that class, are nevertheless employments of the utmost importance to the public. The grocery store furnishes an excellent example. Mr. Wyman therefore argues that the element of importance to the public is not alone sufficient to determine the classification of a particular business. If there was anything in the pamphlet which Mr. Wyman was reviewing, which was taken to make that element alone the test, the writer finds some difficulty in discovering whence a careful reader could have derived such an impression.

Indeed, it appears evident that the critic has entirely misconceived much of the argument of the pamphlet. He dismisses as not pertinent to the issue, all that was said in illustration of the many ways in which, entirely aside from the law of public callings, the enjoyment and use of private property are limited and regulated for the public good; and thus attempts to exclude from the discussion every precedent and doctrine not explicitly relating to *public callings* in the technical sense. Undoubtedly the leading proposition asserted in the pamphlet was the proposition that anthracite coal mining in Pennsylvania under present conditions is a public calling; but one is none too likely to reach a sound conclusion upon a fundamental question of law, who, in the discussion of particular doctrines, neglects all that may be learned as to their spirit and the extent of their proper application, by an examination of legal analogies, and an attempt to determine both the attitude in which the law approaches the entire subject, and the general

policy of which the particular doctrines are a part. It was this conviction which led the writer, in the opening pages of his pamphlet, to point out the many ways in which the law, in the protection of the public interest, regulates in varying degrees the enjoyment of private property. From a study of these examples it was sought to determine the general policy and spirit of the law, and the conclusion was suggested, that wherever the public needs require — not in an individual instance, but as a general rule — that certain rights affecting private property be recognized for the benefit of the public, the law has always been ready to recognize and enforce those rights, applying for that purpose whatever technical doctrine has seemed most nearly suited to the need.

This general principle, as an expression of the spirit and policy of the law, furnished a standpoint from which to examine particular doctrines, and it was constantly kept in mind in the discussion of *Munn v. Illinois* and of the rules of law involved in that case. Mr. Wyman seems to have confused these references to the fundamental attitude and tendency of the law, with statements of technical doctrine. It was contended in the pamphlet that, in a general sense, any business of importance to the public is liable to regulation in one form or another by courts or legislatures, and the decision in *Munn v. Illinois* was described (on p. 24) as a striking example of this general principle. This passage — which is quoted by Mr. Wyman in another review of the same pamphlet, published in another legal periodical — was evidently misread as an attempted statement of the technical law of public callings. The sense in which it was intended has already been explained; and the writer is inclined to feel that a careful reading of the pamphlet up to that point ought to have prevented the misapprehen-

sion; but argument on that question would hardly be profitable.

It may be added that, in the writer's opinion, the conclusions reached in the pamphlet are amply supported by the cases relating to public callings, without requiring additional support from general principles; but the broader treatment was adopted, because of the belief that only in that way could there be presented a fair and complete discussion and a reliable result. A similar course was followed by the Supreme Court in the opinion in *Munn v. Illinois*, upon which the writer modeled his discussion, and which Mr. Wyman very justly says must be the starting point of any proper treatment of the modern law of public callings.

We may turn now from the question of general principles, to the definite rules of law in which alone Mr. Wyman finds anything of value. In what was said in specific reference to law of public callings, there was nothing which questioned in any way the importance of the element of virtual monopoly, which Mr. Wyman seeks to emphasize; and that element was discussed specifically as the one decisive of the question at issue (pages 26–28).

But Mr. Wyman argues further that to bring a business within the class of public callings, not only must it be a business of vital importance to the public, and not only must there be present the element of virtual monopoly, but such monopoly must not be merely casual, as when there happens to be only one grocery store in a certain town, but must be in one way or another founded in the nature of things. It cannot be, says the critic, that a business will be a public calling one day and a private business the next, simply because a group of individuals control all the available supply on the first day and sell out on the second. How far

the common law of monopoly might apply to such a case is, perhaps, a graver question than Mr. Wyman seems to consider it, but for the present purpose that question may be dismissed. Conceding that Mr. Wyman's test is substantially correct, and stating it in very nearly his own language, we find it reduced to the question whether the circumstances surrounding the particular business are such that effective competition may be expected. If the single grocery store in a town charges excessive prices, there is every temptation to some enterprising person to start a rival establishment on the next street, and as a practical matter that is likely to be the result in nine cases out of ten. If an ambitious capitalist buys up all the plants engaged in the manufacture of a certain article, experience has shown that, at least in many cases, he can maintain his monopoly for any length of time only by conducting his business on terms which do not afford too great a temptation to other ambitious capitalists to enter into competition. How far this check is a sufficient one, is a question only recently made vital by modern conditions, and yet to be worked out by judges and legislators. But for the present we may assume, as Mr. Wyman claims, that such a monopoly is not in the nature of things of the kind, with reference to its dangers and its permanency, which calls for the intervention of the courts through the application of the law of public callings.

There remain, however, many classes of cases in which that law has been held to be applicable. Mr. Wyman cites as examples the telephone company, the water company, and the irrigation company, wherein the element of monopoly is perpetuated by the possession of a charter not likely to be duplicated for the benefit of any other company, or by the control of the only available source of supply. The element of a corpo-

rate franchise must not be given undue weight. The law of public callings grew up largely in connection with *individuals* who went into the business of innkeepers, carriers, wharfingers, millers, *etc.*, *etc.* In its most striking modern application, that of *Munn v. Illinois*, the element of corporate charters played no part. Doubtless an exclusive franchise from the State might be sufficient to constitute the necessary monopoly; but it is clearly not essential. The element of monopoly in the case of the old-time carrier and innkeeper arose simply from the fact that under existing conditions there was, in the great majority of instances, not business enough to reward competition. Rivalry was in no way impossible, but from a practical point of view improbable, and in fact usually absent. It is obvious that such a situation may come to exist in a given calling through a change in conditions, and that such change in conditions may in itself, and from a practical point of view, be not transitory but permanent.

Before applying these principles to the case in hand, it should be further pointed out that the monopoly need not be absolute. This is emphasized in the *Munn* case, is supported by the entire law on the subject, and, it is assumed, will not be questioned by any one.

It remains to apply the principles above outlined, in which, so far as they go, there does not seem to be any vital difference of opinion between Mr. Wyman and the writer, to the case of the Pennsylvania coal mines. In the first place, have we there a business into which any enterprising business man or capitalist may enter, whenever the conduct of the business makes the rewards of competition look tempting? Obviously not. There is only one considerable supply of anthracite coal, so far as known, which can be profitably mined for the American market, and that supply is now in the hands of the Pennsylv-

vania coal operators. In other words, we have a case in which the element of monopoly is perpetuated by the control of the only available source of supply. The only competition which can be looked for, then, is competition between the owners, whoever they may be from time to time, of the Pennsylvania mines. It was not intended, in the pamphlet which started the present discussion, to lay stress upon the actual control of the mines at the present day by one or three or seven or a dozen individuals and corporations, except so far as that fact is evidence bearing upon the possibility and probability, under existing and practically permanent business conditions, of limited and more or less unified control. A similar fact was similarly emphasized in the *Munn* case. It may be that at one time the owners of the anthracite mines were sufficiently numerous and sufficiently lacking in business acumen, so that competition between them assured the public of fair and reasonable service. It is theoretically possible that such a situation may return: but that is not enough. Have we a state of things in which we may fairly expect that full and free competition will as a general rule prevail, or have we a situation in which such competition is as little to be counted upon practically, as in the case of the old-time carrier and innkeeper? It is believed that well-informed men of affairs, or sensible judges, could answer these questions in only one way. As was said in the pamphlet, we have "an absolute and inextinguishable 'virtual' monopoly."

It would seem as if Mr. Wyman must, in reaching his conclusion, have ignored the decision and much of the language of the Supreme Court in the *Munn* case. Theoretically, there was nothing to prevent a dozen persons from building a dozen new warehouses in Chicago, and competing with the elevators which then handled all the business.

There was lacking there the element of a definite limit to competition, imposed in the case of the coal mines by the fact that all the available deposits of coal are now being worked. It was true, however, that competing elevators must be built within a limited territory, at considerable expense, and subject always to the danger that the presence of too many of them would destroy the profits of all. It was doubtless these considerations which led the Supreme Court, in the exercise of judicial common sense, to find a virtual monopoly, and one not casual or transitory. If there is any advantage either way, the case of the coal mines, viewed with a similar practical common sense, would seem to be distinctly stronger. In brief, it may be said that the law has always recognized a competition necessarily limited to a small body of persons, as a competition not to be relied upon for securing the public welfare. It is exactly such a situation that is characterized in the *Munn* case as constituting a "virtual monopoly." Numerous other cases might be cited on this point, but none could be found more elaborate, more thorough, more weighty, or more entirely in point than *Munn v. Illinois*.

It will thus be seen that while accepting Mr. Wyman's statement of general principles as substantially similar to that which the writer endeavored to make in his pamphlet, we come to a conclusion from the application of those principles directly opposite to that which Mr. Wyman has reached.

It should be added that a judicial decision, holding that the business of mining anthracite coal in Pennsylvania is a public calling, would not, as Mr. Wyman maintains that it would, result in placing all coal mining in that class of employments. It is an essential element of the case that the particular kind of coal found in a limited district of Pennsylvania, possesses qualities which dis-

tinguish it from all other fuel, and that for many purposes no perfect substitute is known. If this were not so, we should have seen only a fraction of the hardship which in fact resulted from the great strike. The writer's argument has proceeded entirely on the assumption, so well supported by recent experience, that Pennsylvania anthracite may be considered as a commodity by itself, and that the application of the same principles to the mining of other kinds of coal depends entirely on the similarity or dissimilarity of conditions. It does not follow necessarily from *Munn v. Illinois*, that every man who owns a warehouse anywhere, and stores grain in transit, is engaged in a public calling. In the later case of *Budd v. New York* (143 U. S. 517), which also concerned grain elevators, both counsel and court properly devoted some little argument to the question, whether the conditions in that case were such as to bring it within the rule of the *Munn* case. All the more would such an inquiry be necessary, before what has been said of the mining of Pennsylvania anthracite could be applied to the mining elsewhere of other kinds of coal, much more widely distributed in the earth, supplying other markets, and used to a considerable extent for other purposes. It may at least be doubted whether the same result would be reached.

The only other criticism which has come to the writer's attention, opposing the contention that anthracite coal mining in Pennsylvania is a public calling, is one based upon a supposed distinction between a sale and a service. The answer to any such distinction is easily found in the cases of bakers, gas and water companies, and other similar employments. Indeed Mr. Wyman, in the article above discussed, pointed out the fallacy of that criticism.

Another objection, from a different point of view, is found in a contribution by Mr.

Joseph B. Warner to a leading newspaper. Mr. Warner, while not taking issue on the legal soundness of the writer's views, objects to what he imagines would be the economic results of their application. The knowledge that, if a strike in certain classes of industries is sufficiently prolonged, the courts will interfere and appoint a receiver to run the business, would, in Mr. Warner's opinion, prove the greatest possible incentive to strikes, and would place all such industries at the mercy of shrewd or reckless agitators. With reference to this objection it is, perhaps, sufficient to say that the present writer's pamphlet dealt with a question of law, and not with economics, and that if its views of the law are correct, possible economic evils must be left for the legislature to correct, if those evils shall in fact arise. A word or two may be added, however, in answer to Mr. Warner's position.

The establishment of the principles of law under discussion, as applicable to such industries as that of coal mining, would undoubtedly prove a very effectual preventive of such strikes as result from refusal by employers to grant *reasonable* demands on the part of their employees; and when the demands are *unreasonable*, it is doubtful if the strikers would want more than one experience with a Federal receiver; for no other person could so effectually use all the machinery of the Federal law and the Federal government to prevent interference, intimidation and unlawful combination, and to secure labor at the lowest price which free competition among laborers could produce.

If, for example, a Federal receiver had been placed in charge of the Pennsylvania coal mines, he, as an officer of the United States, would not have been controlled by State laws allowing only licensed miners to work; and he would have been able to prevent violence and intimidation by the means

so effectively used in the Debs case, and, so far as he was hampered by any illegal features of the miners' union, would have had at his hand the machinery of the courts with which to enjoin and punish such features; so that in a short time he would have been able to supply all the mines with competent workmen at fair wages, as determined by supply and demand, whatever such wages may be. If the demands of the miners were unreasonable, he, if any one, would have been able to run the mines without acceding to those demands; and in a longer or shorter time the original employees of the coal companies — assuming always that their demands proved to have been unreasonable — would have been ready to make terms. That the mines might have suffered financially from such a sudden change of management, with all its incidental expenses, is doubtless true, but so they would have suffered from the continuation of the strike; and one experience, in such a case as that supposed, would doubtless have amply satisfied the miners. In other words, the remedy which the writer proposed, if once known to be applicable and likely to be applied, would soon come to exercise the most powerful influence on both employers and employees, strengthening the hands of either in a just fight, and disheartening either in all cases of unreasonable pretensions.

It is a fact which the history of every country has emphasized, and which is strikingly illustrated by present conditions in the United States, that social and economic changes constantly require an adjustment of the prevailing legal system to meet new dangers and new problems. From the earli-

est times, the system of law prevailing in England and in this country has been undergoing such readjustments, sometimes by legislative enactment, as in the case of the Statute of *Quia Emptores*, or the Statute of Uses, but oftener by the development of the common law, as when the commercial law of England was practically created by Lord Mansfield. In Mr. Wyman's opinion, the greatest danger in a crisis like that of the recent coal strike, is that the courts, under the stress of a temporary emergency, will depart from what he regards as a conservative application of established legal principles. But experienced lawyers will undoubtedly agree that such changes and adaptations as are made by the growth of the common law, are likely to be at once more effective, more nicely adjusted, and less dangerous, than changes which are brought about by legislation. Especially is this true in a country like ours, where there is always the danger that a public clamor, arising at a moment of peculiar hardship, and encouraged by politicians for their own purposes, will result in hasty and ill-considered legislation. In no way can such legislation be more facilitated, than by hesitation or timidity, on the part of lawyers or judges, in applying to a recognized evil the remedies afforded by familiar principles of existing law. The writer believes that before an attempt is made by statute to meet the dangers which are discerned in our present economic conditions, the extent to which those dangers are within the reach of the general principles of established law should be clearly brought out, and those principles should be applied without fear or hesitation.



## SOME PECULIAR LAWS.

BY SOLOMON MENDELS.

AT this later day when enactments are rigidly construed by superior tribunals to determine whether or not they are in conformity with the basic law which is always so framed as to jealously guard individual rights, we cannot but marvel when we read of such regulations as are instanced below. They are extracts from the earliest laws of Connecticut and are embodied in a curious little volume of about one hundred pages, five inches long and three inches wide, on the title leaf of which is imprinted in bold capitals, "The Code of 1650." The following examples are the most unique :

"No person or persons licenced for common intertainment, shall suffer any to bee drunken, or drinke excessively, viz., above halfe a pinte of wyne, for one person, at one time, or to continue tipling above the space of halfe an houre, or at unreasonable times, or after nine of the clock at night, in or about any of theire howses, on penalty of five shillings for every such offence ; and every person found drunken, viz., so that hee bee thereby bereaved or dissabled in the use of his understanding, appearing in his speech or gesture, in any of the said howses or elsewhere, shall forfeit ten shillings ; and for excessive drinking, three shillings, foure pence ; and for continuing above halfe an houre, tipling, two shillings, six pence ; and for tipling at unseasonable times, or after nine o'clock at night, five shillings, for every offence in these perticulars, being lawfully convicted thereof ; and for want of payment, such shall be imprisoned untill they pay, or be sett in the stocks, one houre or more, in some open place, as the weather will permitt, not exceeding three houres at one time etc." This salutary provision of the Code is designated

in the statement of grievances which precedes it as a *strict lawe and rule* regulating the business of *inkeepers*. Drinking excessively is defined as imbibing more than a half pint of wine at a time, or a continuous quenching of thirst for more than half an hour, or at unreasonable times, or after nine at night. These criterions are indeed unique and must have put the lover of brisk liquid constantly on his guard. The nine o'clock limitation is characteristic of the times. "Unreasonable times" is difficult to construe. It may mean that the colonists had regular hours for drinking. How different are these provisions from the modern laws governing the sale of intoxicating liquors. The colonial restrictions are gross violations of individual liberty, for every man must in these particulars be his own judge, subject only to such general limitations as are established for the public peace. Such are reasonable, as is evidenced by the modern enactments on the subject.

The penalty provided for burglary would at this day be denoted a cruel and unusual punishment. For the first offence the criminal was branded on the forehead with the letter B. For the second offence he was again branded and severely whipped. For the third offence he was put to death. If committed on the Lord's day the crime was highly aggravated. An additional penalty for the first offence was provided. One of his ears was cut off. If again convicted, off went his other ear, and death followed a third offence. Burglary is a heinous crime, yet hardly merits such severe punishments. Human life was held in small esteem in these days. Rebellious children, perjurers, abductors and witches were put to death.

That the most serious of crimes were so severely punished we cannot wonder. These were troublous times. The colonists were in constant dread of the surrounding Indians, and internal peace and order must be had at any price. But that the Code should punish acts not *mala in se* and in our day not even *mala prohibita* as severely as it did, is remarkable. Shuffle-board was interdicted because, says the preamble to the act, it caused much disorder in the taverns, "whereby much precious time is spent unfruitfully, and must waste of *wyne* and *beare* occasioned." The law favored matrimony by forbidding young unmarried men to keep house for themselves without the consent of the town, under a penalty of twenty shillings per week. This I imagine was salutary in effect.

"No person, householder, or other shall spend his time idly or unprofitably, under paine of such punishment, as the courte shall think meete to inflict, and for this end, it is ordered, that the constable of every place shall use speciall care and dilligence, to take knowledge of offenders in this kinde; especially, of common coasters, unprofitable fowlers, and tobacco takers etc." This law appears a wise provision in a day when the idle man was a burden to the progressive colonists. So also lying was severely punished by fine, whipping and by confinement in the stocks. No one was allowed to smoke until he was twenty-one years of age, and no one over this age unless he had accustomed himself to the use of tobacco. However, a physician's certificate, or an order of court, removed all disabilities in this connection. No one at all was permitted to smoke in the streets, highways or barnyards under penalty of a heavy fine.

These are the most peculiar instances of legislation in the Code. It will be seen that in almost every instance the law is vague and indefinite and thus impossible of exact construction. The early settlers in America were men of very narrow views, and no better illustration of this can be found than in their bearing on matters of religion. With the exception of the Rhode Island colonists, they were extreme bigots. No one was right but they. It is hence but natural that their views on this subject should be reflected in their actions on others. While it is true that the exigencies of the time demanded strenuous legislation, yet when a colony goes to the length of prohibiting that which every man has a perfect right to do, it has overstepped the bounds of legislation and has gone to the realm of tyranny and oppression. We must not suppose that these laws became very popular. This is conclusively shown by the frontispiece of the little volume under consideration. It is entitled "The Constable seizing a tobacco taker." A constable is represented in the act of arresting a tobacco chewer. As he seizes the delinquent he exclaims, "Chaw tobacco will you?", but receives this reply mixed with a shower of tobacco juice: "Say nothing, you shall have some of the tea." The wife and children of the constable are on the scene. "Mam, dad has catcht a man chawing tobacco," says a child, to which the mother answers, "My child, he will have his deserts." Suffice it to say that such laws may be supposed to exist in the infancy of civil government, when the State, being but recently born, is struggling for existence, and when the growth must not be impeded by internal disorder and dissension.



## LANDMARKS OF CHINESE LAW.

## III.

BY VINCENT VAN MARTER BEEDE.

**T**WELVE of the two dozen criminal cases of Lan Lu-chow, the literary representative of the present dynasty, have been translated<sup>1</sup> by Herbert A. Giles, M.A., LL.D., professor of Chinese in Cambridge University. Lan was a distinguished and upright magistrate. After making enemies by reason of his very goodness, he was wrongfully cashiered and imprisoned. It was not long, however, before the Emperor heard of the unusual fineness of the man and made him a Prefect at Canton, but the disgrace of the charge had broken his heart, and he died at fifty-three, only a month after entering upon his new duties. The case styled "The Three Body-Snatchers" is as unaffectedly amusing as any. The following narrative is an abridgment from Giles:

In 1727 (said Li) I was petitioned by one Wang in the matter of the death by poison of his second cousin, Ahsiung. Ahsiung's mother had married again, becoming, the second time, the concubine of one Chen, who lived in another village. Wang suspected that Chen's wife had poisoned the son of the new concubine out of jealous hatred of her and hers. Ahsiung was found with fingers drawn up and lips of a livid hue. Wang filed the usual bond. I went to hold the inquest the next morning, but found no corpse; whereupon Wang loudly accused Chen of making away with the body to protect his wife. Chen and his family had nothing to say, and I learned from a physician that Ahsiung had been sick with dysentery for two months. Moreover, Chen's wife was suffering from a severe dropsy, and seemed quite incapable of poisoning any one.

<sup>1</sup> *Historic China, and other Sketches.*

A dozen witnesses were questioned in vain as to the whereabouts of the corpse. I began to suspect that Wang himself had removed it. Ahsiung's mother declared that Wang had not entered her house on the day that the boy was murdered. The next day Wang had visited a girl cousin of his. Had she a son? Yes, a boy of fifteen, who testified that Wang had asked him whether Ahsiung had been buried, and that he had told Ahsiung the location of the grave, on the hills. At this I cried: "The body has been stolen by Wang!"

Under the torture of finger-squeezing Wang confessed that he had hired a beggar to open the grave at dead of night. But since he evaded my further questions as to where the body was concealed, and who was his legal adviser, I sentenced him to thirty blows, and to the cangue in the district city. I released Chen and his family and all other persons implicated in the prosecution. The several thousand spectators shouted gladly in the belief that the case was at an end. I had not gone more than a furlong when I instructed one of my runners to lay aside his uniform and hurry to an inn at the East gate of the city, where he was to inquire how long Wang had stayed in the house, and if he found any one in the room he had occupied, to arrest that person. The latter proved to be a pettifogger named Wang Chuo-ting. This man swore that he was not even acquainted with Wang Shi-hi. I then remembered that to the charge filed were also signed the names of the man who had drafted it and of the guarantor of good faith. From them I learned that the pettifogger had been among the party. I handed him a

pen and paper and bade him write his deposition: when I saw immediately that he was the copyer of the original petition. The three wooden instruments were brought into play and he acknowledged that the body-snatching plot had been hatched and carried out in another district (Lan's jurisdiction was strictly limited to his own district) by an old pettifogger named Chen Wei-tu, and that even Wang Shi-hi did not know the actual spot where the corpse was deposited. Chen Wei-tu was arrested and turned out to be an old scoundrel ten times more crafty than Wang Chuo-ting. Chen swore that he was innocent; that Chen Tien-wan was his cousin, and that the two Wangs were trying to ruin Chen Tien-wan.

Noticing that Chen Wei-tu had restless eyes; I counselled him to make an open confession. He kept silent, but Wang Chuo-ting gave him away entirely, and called me a second Judge Pao.

"If these two men," said I, "were trying to ruin your cousin, how is it you came to be eating and drinking with them on friendly terms at an inn?" "An accident," replied Chen Wei-tu. My next step was to examine Wang Chuo-ting as to the room they had occupied. I also examined the landlord and his son. There being no doubt now as to the conspiracy, I put Chen Wei-tu to the torture, and he confessed that he had embraced an opportunity to vent his spite on Chen Tien-wan, in consequence of a quarrel. He admitted that he had buried the body outside the Black Stone Fort, four or five feet deep. I sent Wang Chien-ting, under the charge of runners, to the place indicated. Ahsiung's body was found wrapped in a mat, but my experts who examined it (*externally only*, note) reported no unnatural cause of death.

Chen Tien-wan wept when he saw Chen Wei-tu. I was advised to report the case to

the higher magistrates, and by so doing make a great name for myself, but I said: "The Pu-ming district has been suffering from bad harvests. I have been here only a month, and my affairs are unsettled. The three body-snatchers would certainly be put to death, and my report would involve the attendance at the provincial capital of a large number of persons, who need to attend to their families at home." I therefore ordered the three culprits to receive the full legal tale of blows, and caused an account of the crime to be written on a board in large characters. This was borne aloft in procession, and the three men were exposed in the cangue at various points. Thus were the people of Pu-ming satisfied.

As a rule, official attention is not paid to crime until the wronged person brings up the matter. There are four or five days in a month when complaints may be legally entered; on other days there is recourse to those proverbs which Adele N. Fielde cites in her admirable little sketch, "Suits at Law": "When the moneyless speak, the hearer hastens away"; "If you have enough money, you can hire a demon to turn your mill." Five cents is charged for a sheet of paper bearing the official stamp of the magistrate, and one dollar for the work of the notary heretofore described. The clerk may decline to forward the document, if the plaintiff is lacking in money and social influence. If he is rich and powerful, and the charge is against a person who has friends at the yamun, the defendant will receive unofficial notice and the case will be settled privately. The amount of bribes determines the speed of getting a hearing. No money, no magistrate.

Perhaps the complainant, who has been disregarded the first time, is persistent enough

<sup>1</sup> *A Corner of Cathay.*

to enter a second complaint, well bolstered by silver and influence. Another proverb goes in this wise: "If chaff is squeezed with sufficient force, it will yield oil." This time four or five constables are dispatched to the house of the defendant. The terrified family keeps out of the way, and the constables smash dishes and furniture. The responsible negotiator arrives with the intention of hauling to prison certain members of the household: these are *always* absent. The family plucks up enough courage to return and offer bribes and a breakfast. Then more furniture is broken, by way of pastime, and the family gather together a large number of cash. The constabulary is urged to smoke opium; a fowl (dear to the Chinese palate) is cooked; pork and wine are brought. If the Law is received in the first place with open arms, it may condescend to report: "No cause for action." Supposing that the accused is dragged summarily to prison, his only food is what his relatives supply; and he may go untried for years. No wonder that it is profitable to pay a yamun-runner rather than be arrested. If no counter-charge is entered, the constables continue their raids until the family is ruined.

A counter-statement is entered in the same manner as a complaint, with like expenses. After draining the plaintiff dry, the constables pocket the warrant and report favorably of their "client" to the magistrate. The complainant sends up another complaint — and so on, till one party or the other gives in. It is not strange that every Chinaman wants to belong to a protective guild. The party that realizes coming defeat engages a mediator — usually a petty official — to withdraw the case from court, treating the said official to supper, and under his advice offering the yamun officials a certain number of meals in return for their kindness. Each meal must cost ten dollars, and even the poor

man must pay, as a matter of the commonest decency, several tens, and the rich man several hundreds of dollars, for the privilege of withdrawing from court. Of course the mediator must be compensated, not only with money, but also with a pair of shoes in place of the pair which he has worn out in running on the client's business. When private settlement cannot be arranged, each litigant gets his opponent brought before the magistrate. The constables must again be fed for haling the prisoner. Accuser and accused go into court accompanied by influential friends. Each suitor personally presents his side of the case. Witnesses are summoned and tortured, and at the end of the examination the judge throws down a tally marked with the proper number of blows; or he may pronounce a more severe sentence. "It is better," say the experienced Chinese, "to live on garbage than to go to law." "If you consort with beggars, you may have a handful of rice given to you, but if you go among yamun people you will lose your last coin."

Mrs. (or Miss) Fielde goes on to relate the story of two warring clans. It seems that near Swatow, in southeastern China, the twelve villages of the Plums repeatedly stole the harvests from the single small community of the Stones. The Stones prevailed on their one Scholar, a literary graduate of the first degree, to set forth their wrongs in poetry, and this is what he handed to the new magistrate at the head of the department:

"The great clans Plum make one small clan, sur-named the Stones, their prey;  
The haughty Plums, in twelve large villages, in strong array,  
Surround the lone, weak hamlet of the Stones. They spoil their fields  
Of ripened grain; their watch-dogs kill; their cattle lead away;  
Their children kidnap and harass; their women put to shame;

And seize and hold their men in durance till they ransom pay.

Unless you soon redress our wrongs, the village of the Stones

Will have no habitant. Oh! Sire, we wait you, night and day!"

The magistrate was impressed and the Plums began to fear for their lives until the plan came to them of bribing the Scholar to make a counter-statement, also in faultless verse. This he was happy to do:

"One village with another vies, and each its strength displays

As rival of its neighbor. Clans of Plum and Stone, each sways

Its region. Though the Plums be many, and the Stones be few,

A single Stone, if great enough, ten thousand Plums outweighs."

The magistrate, deciding that the Stones were quite powerful enough in possessing this brilliant and resourceful Scholar, took no action, and consequently the Stones were nearly exterminated by the Plums. Some of the Stones entered other clans and assumed new names; some went into voluntary exile; the women and children died, or were sold, until only the family of the Scholar remained. The Plums naturally had a fondness for him, yet at the same time they feared he might unexpectedly use his talents against them. Indeed, so conflicting became their feelings toward this remarkable man that at length they bore him for three days in a Sedan chair as though he had been a god: then they killed him. The Stone clan now no longer exists; not even the village remains.

*The Peking Gazette*, the oldest newspaper in the world, is a daily "record of official acts, promotions, decrees, and sentences, without any editorial comments or explanations; and, as such, of great value in understanding the policy of the Government." The following is a translation<sup>1</sup> of an entry of

<sup>1</sup> Shanghai, 1878.

July 1, 1877, reprinted from the *North China Herald and Supreme Court and Consular Gazette*:

Chung Hai, acting Governor-General of Sheng-king, with his colleague Ming Ngan, Vice-President at the head of the Monkden Board of Punishments, memorializes reporting the result of a trial held in the case of an imperial clansman named Ming Hai, accused of causing the death of a Buddhist priest named Wang Sing-tsing by stabbing. The case goes back to 1870, in the autumn of which year, it appears, the priest Wang proposed to an acquaintance named Lin Siang that they should combine to open a gambling house at Monkden, which they forthwith proceeded to do. Wang provided a brass bowl, which he had in his possession, and one hundred dominoes, each of which was to be reckoned (for gaming purposes) at one thousand current cash,<sup>1</sup> and Lin Siang having got ready a table, benches, and other appurtenances, the establishment was opened the same day. Lin Siang acted as *croupier* and Wang undertook the task of passing around the bowl and collecting the dominoes. Persons, by name unknown, were in the habit of coming in daily to gamble, and up to the day on which the accused was apprehended on the charge of murder, the keepers of the table made a profit of from ten to thirty tiao of current cash *per diem*. On the 2d. October, 1870, three imperial clansmen, viz., one named Sung Tien, Ming Hai, who was under conviction for an offence committed, and Ming Shen, since deceased, came in one after the other to do some betting. Shortly afterwards, the bowl being with Sung Tien, he was a loser to the extent of four dominoes; but the priest Wang believed that the number was in reality five. When the bowl was lifted, Sung Tien concealed one of the dominoes, whereupon an alterca-

<sup>1</sup> A cash is equivalent to one-eleventh of a cent.

tion arose between himself and Wang, the latter exclaiming: "You and your yellow-red girdle! All you are fit for is to swindle! You never think of acting decently!" [N. B. — The allusion to the color of the imperial clansman's girdle implies that he was a man disgraced for misconduct.] High words continued between the two, until Wang, drawing a double-barreled foreign pistol, loaded and capped it, and was about to fire at Ming Hai. The latter, fearing that he was about to get the worst of it, snatched up a sharp-pointed knife, and made a threatening plunge with it in the direction of Wang, the result being that the latter was stabbed in the abdomen, and fell down with a loud cry, dying shortly afterwards from the effects of the wound. An alarm being given by deceased's mother, the parties were taken into custody, and sundry trials have been held, the result of which has been unsatisfactory. A special court has now been convened by the memorialist's orders, at which a secretary of the Board of Punishments has presided, with the local superintendent of the imperial clansmen acting as assessor. Ming Hai is sentenced to death by strangulation, according to statute, for the act of murder in the course of a personal encounter, of which he is proved guilty, and to be confined in the prison of the Clan Court pending confirmation of his sentence. The keeper of the gambling table, Lin Siang, and the other individuals concerned are respectively sentenced to bastinadoing and temporary banishment, according to law. Referred by rescript for the consideration of the Imperial Clan Court.

Archdeacon Gray, in his *China*, describes some of the filthy details of prison life, and says: "The walls of the various wards abut upon one another, and form a parallelogram. Round the outer wall of this parallelogram a paved pathway runs, upon which the gates of the various wards open.

This pathway is flanked by a large outer wall, which constitutes the boundary wall of the prison." The image of a prison god stands in each ward and is supposed to exert a softening influence upon the hard-hearted. Its birthday is celebrated by a meagre feast provided by the governor of the jail, who later makes up for his generosity by helping himself to portions of the general funds. Above the entrance door of the narrow passage opening into the prison is painted a tiger's head with staring eyes and gaping jaws, and inside the building the figure of this beast stands upon an altar. This is the turnkeys' god, who will help them to keep their prisoners from running away.

Whole families are sometimes thrown into prison as a punishment for the flight from justice of a criminal relative. The innocent sons of a would-be assassin of the Emperor Ka-hing, in 1803, were immediately strangled. A great many prisoners die as a result of unsanitary conditions: so that a dead-house is always built in connection with a prison, and put to frequent use. Gray remarks the emaciated appearance of prisoners, who not being permitted to shave, look more like demons than men. Prison dress is red, with the name of the prison written in large characters on the back of the coat. Prisoners are occasionally released on such state occasions as the accession of an Emperor, and there are frequent instances of officials giving money toward lightening the misery of the prisoners. For instance, a provincial treasurer named Ow once gave an amount to the salt monopoly, and devoted the interest to purchasing comforts for prisoners in the principal jail of Canton.

As may be judged, the prison officials, especially the lower grades, are well hardened, and by no means averse to sharing booty with a thief. The governor of a prison purchases his appointment and receives no sal-

ary; therefore he expects the friends of prisoners to reward him generously for providing them with extras like vegetables, and firewood for cooking purposes. The State allowance barely keeps the convict alive. A government official inspects the prison once a month. Among other things, he tabulates the number of deaths of prisoners, and if the percentage of mortality is too large, officials are degraded all the way up the scale. Contrarily, merits are noted and bring promotion to the officials concerned. Houses of detention within the precincts of the yamun contain large rooms for those prisoners on remand whose friends are lavish in their gifts to the governor. The larger this room, the more crowded the quarters of the friendless must be. Gray compares certain houses of detention he has visited to the Black Hole of Calcutta.

No need to dwell long on those extreme punishments which an Eastern despotism regards as just. Confinement in a cage which is too long or too short for ease is a degree worse than the cangue. The victim of Lingchee is lashed to a cross and slowly cut into from twenty-four to one hundred and twenty pieces. The renowned Hakka rebel leader, Tai Chee-kwei, was put to death in this way, but the punishment is now rare. Dyer Ball<sup>1</sup> does not mention it among the regular penalties. Persons condemned to decapitation are given the shortest possible notice as to when they are to die. After a farewell meal and cigarette the prisoner is generally carried to execution in a kind of basket, with his name printed on a slip of wood attached to his hair. He kneels, a lictor jerks back his arms, and the executioner severs the head with a heavy

<sup>1</sup> In *Things Chinese*.

sword, as a rule by one stroke; occasionally he finds it necessary to use a knife in addition. Hunter, author of *Bits of Old China*, tells of witnessing the execution of fifty-four rebels on the same occasion by a number of headsmen. The signal was given by a mandarin seated at a table.

Crime in China is sometimes curiously involved. Hunter<sup>1</sup> heard of a thief who dropped his plunder in the dead of night and fled upstairs. The family finally discovered him, hanged by his own girdle. The humility of losing his "swag" had proved unbearable. This same writer relates the case of two passers-by who violently collided in the street. As a result one of the pair died; and the other was executed.

#### APOLOGIA.

In vain hands bent on sacrifice or clasped in prayer  
we see;  
The ways of God are not exactly what those ways  
should be.  
The swindler and the ruffian lead pleasant lives  
enough,  
While judgments overtake the good and many a  
sharp rebuff.  
The swaggering bully stalks alone as blithely as you  
please,  
While those who never miss their prayers are mar-  
tyrs to disease.  
And if great God Almighty fails to keep the balance  
true,  
What can we hope that paltry mortal magistrates  
will do?<sup>2</sup>

#### YAO'S ADVICE.

With trembling heart and cautious steps  
Walk daily in fear of God. . . .  
Though you never trip over a mountain,  
You may often trip over a clod.<sup>3</sup>

<sup>1</sup> In *Bits of Old China*.

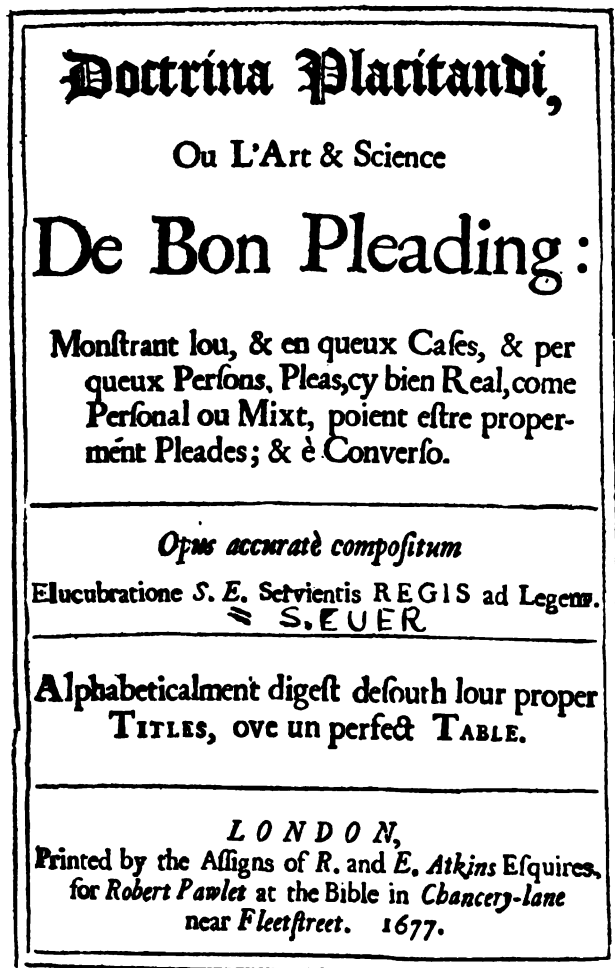
<sup>2</sup> Hsieh Chin, A.D. 1369-1415.

<sup>3</sup> *Chinese Poetry in English Verse*.

## DOCTRINA PLACITANDI.

BY E. ALLEN FROST.

IN the preface to the first edition of his work on pleading, Mr. Stephen, writing of *Doctrina Placitandi* says: "The science of pleading, though vying with most other and defective. The most important of these is the *Doctrina Placitandi*, published in the reign of Charles II.; a work which, though extremely learned and elaborate, and for a



branches of our law, in antiquity, and always among the highest in professional estimation, has been among the last to receive satisfactory illustration from the press. It is true that at early periods there were treatises on this subject, but their plans were confined

long time justly considered as the capital source of information upon pleading, amounts, after all, to no more than an extensive collection of adjudged points, classed without any skill of arrangement, under titles in alphabetical series. In more modern times,

the *Digest of the Laws of England*, by Lord Chief Baron Comyns, presented, under the title 'Pleader,' a more systematic compilation upon this subject, than had previously appeared — comprising the substance, not only of the authorities collected in the *Doctrina Placitandi*, but also of the cases subsequently decided, and reducing the whole, under different heads, upon a plan peculiarly scientific and masterly. It is, however, in its nature, only a digest of authorities, and better adapted, therefore, to the objects of the practitioner than of the student."

In Dublin, in the year 1791, James Moore printed a book entitled *A System of Pleading including a translation of the Doctrina Placitandi or the Art and Science of Pleading, originally written by Samson Euer, Sergeant-at-Law and now first translated from the Obsolete Norman French, etc. By a Gentleman of the Middle Temple.*

And another has said of this curious old work : " The *Doctrina Placitandi*, the best of the old treatises upon pleading, was formerly in the highest repute. Chief Justice Willes said that there was more law and learning in *Doctrina Placitandi* than in any book he knew ; and that it contained the substance of all the pleadings in the year books and Coke's reports. Other judges have been equally warm in its praises. It is little else, however, than an accurate alphabetical digest of cases upon pleading, the substance of which will be found in Stephen's Pleading, and Samson Euer is now far advanced upon the road of forgotten authors." See 2 Wilson 88 ; 1 Crompt & J. 317 ; 2 East 340 ; 6 N. A. Rev. 62 ; Marvin's Legal Bibliography, 299.

The title-page has on the back in large type : — " I Allow and Approve the Printing and Publishing of this Book, Fra. North."

## A POSTHUMOUS WORK OF LORD COKE.

IN 1719 one T. Fleet of Pudding Lane, London, published a little book entitled *Mother Goose's Melodies*. The authorship of these poems has been the subject of heated controversy for almost three centuries, but now the question seems to have been settled for all time. The following passage from the diary of one Henry Fleete, recently exhumed by the Shellgame Society, has an important bearing on the matter :

" Aprylle the Fyrste, 1629. This daye did Sir Edward Coke visit me, bearinge with him a large roll of papper the whiche he did give unto my keepynge. He did request me to leave it to my heires and that it should be printed and given to the world in ninetie yeares from this date."

That the heirs faithfully carried out the trust has already been shown. It may be argued that there is no record of Coke's having published any posthumous work either during his lifetime or after his death. But this is a mere detail and should not militate against the strong external evidence of authorship just quoted, or the even stronger internal evidence of the poems themselves.

Take for example the following selections :

There was an old woman  
Lived under a hill ;  
And if she's not gone,  
She lives there still.

Here am I, little Jumping Joan ;  
When nobody's with me,  
I'm always alone.



The unanswerable logic of these passages points at once to the fact that they must have emanated from a legal brain. But this is not enough. We must find signs that the author had a thorough grasp of the intricacies and technicalities of the common law. And such signs are easily found. For instance, note this beautiful quatrain :

Diddelty, diddelty, dumpty,  
The cat run up the plum tree ;  
Give her a plum, and down she'll come,  
Diddelty, diddelty, dumpty.

No clearer exposition of the essentials of a contract has ever been put forward. Or again :

To market, to market, to buy a plum cake,  
Home again, home again, market is late ;  
To market, to market, to buy a plum bun,  
Home again, home again, market is done.

Could there be a more explicit reference to the English doctrine of market overt ?

A notable example of *ferae naturae* is found in the pathetic story of Little Bo-Peep. So in

Little Tommy Tittlemouse,  
Lived in a little house ;  
He caught fishes  
In other men's ditches

is found a most careful treatise on the right to fisheries.

Nor are all the references to civil rights, for Coke was well versed in the criminal law. The essentials of larceny are well set forth in this poem :

Lucy Locket, lost her pocket,  
Kitty Fisher found it ;  
There was not a penny in it,  
But a ribbon round it.

The most conclusive bit of eternal evidence of all is found, however, in the following lines :

Tom, Tom, the piper's son,  
Stole a pig and away he run.  
The pig was eat, and Tom was beat,  
And went a-roaring down the street.

In the time of Lord Coke it was held that a dog was not the subject of larceny. But the keen mind of the author at once grasped the all-important fact that a pig was not a dog. Nay, more, that a pig differed essentially from a dog in its legal *status*. In view of this, it is impossible to believe that any sane man can say that there was a single person in England capable of such a masterpiece of ingenuity except Edward Coke.

It is believed that as time goes on *Mother Goose's Melodies* will be raised from the nursery to the law school, and that due credit will be given to Coke for an invaluable addition to legal literature.

## A GRAVE PROBLEM.

By W. ARCHIBALD McCLEAN.

NOTWITHSTANDING the immortal bard made the great Mark Anthony say,

The evil that men do lives after them,  
The good is oft interred with their bones,

a rule is most respectfully asked for to show cause why the aforesaid saying should not read,

The good that men do lives after them,  
The evil is oft interred with their bones.

In support of the rule this brief is submitted.

The idea of burying the good and keeping the evil as Father Time gathers in the race, is accumulatively horrible. Necessarily this would mean that the influence of all men for

all time would be worse than nothing. The world must be conceived as full of ghosts of the evil ways of men stalking up and down among men, all bent upon the creation of an immortality of evil. The world would be growing worse instead of better. There would be no evolution from lower to higher species, from good to better, but the trend would be backwards towards the worst of the type and still on backwards. The people would be losing their souls, for the evil that men do which lives after them would be stealing them. How is it, Willie, are you right about this or wrong?

From the most ancient of days comes the admonishment to speak good of the dead. To keep in remembrance the good, to bury the evil, has been the preachment. This has become a truth that flows through the blood of the race. The great majority of us will berate a fellow being as long as we have him with us. Once he is out of reach we open our mouths to continue the berating, but because we do not like to hear the sound of our own voices speaking ill of the dead, we shut them and try to think of his good points, and, strange, we now find them. When we come upon some one who recklessly speaks ill of the dead, how we hold up our hands in holy horror. This characteristic of the race means that we are burying or trying to bury the evil all the time and are keeping or trying to keep the good. Which is it that lives after us, anyhow?

Good and evil are in many respects abstract terms. Good is the understood, the evil often is the misunderstood, and the evil becomes the good when it comes to be understood. These terms may mean the sum total of the aspirations of the soul or its despondencies, or *vice versa*, often depending upon the point of view. They may mean when applied to dead men, departed strength or weakness. Take a look backward; does

not memory bring you the better part of the dead? We are all genuinely shocked, are we not, or do we only pretend to be, when those of us who are buzzards pick over the bones of the dead. We make no claim that the most of us are birds of paradise, — simply that we are not buzzards with their memories.

The subject presents a more restricted question, namely, what do we bury when we inter the bones of the dead, — good or evil? That depends, if with the bones goes corrupting flesh afflicted with small-pox, yellow fever or the many other ills flesh is heir to. Those who survive must often feel that evil has been interred with the bones, evil that would seek to live afterwards. If, however, one sinks to sleep whose life has been a blessing to all about her, it is difficult to think anything else than that the capacity for much good to others has been interred, and we comfort the thought that we still have the influence of that life with us and hope that that capacity has gone where it can have greater appreciations.

When we come to throw legal precedents at the immortal William, to quote authorities and cite the decisions of the courts, we are compelled to reach an even yet more restricted point of view of the subject. It must be further admitted that the respondent could get much comfort out of them. Could he talk back he would undoubtedly hopelessly confound us or hoist us on our own petards, for as long as courts reverse themselves they sometimes throw boomerangs.

The point is this, — given a body buried, is it evil or good in a physical sense that is interred with the bones; does that which lives after men work physical good or evil in the grave to the rest of humanity so as to require the intervention of a Court of Equity to abate the residuum?

It has been legally determined that there

can be no property in a corpse, that sepulture is so universal that in all civilized countries it is required that dead human bodies be decently interred, and that it will be only under unusual circumstances courts will disturb the repose of the dead by permitting a removal of their bones. Though courts have used this very language, they have never deigned to explain how such removal would disturb a repose that has become an absolute rigidity of a fixidity. Notwithstanding all this *dictum*, courts have been compelled to go further and declare that cemeteries *per se* are not nuisances.

It sounds like a saw to have a Court remark, "burial-places for the dead are indispensable." Well, rather, when corpses will not patronize pyres and crematories. It is just as much a saw for us to say that until time runneth not we are likely to have this indispensable with us. We must confess it would be extremely difficult to get along without having what we cannot do without. What would we do with the stiffs? The medical schools would have reached a millennium of a supply which they could never exhaust.

This same Alabama Court further asserts that burial-places may be the property of the public, devoted to the uses of the public, or the owner of a freehold may devote a part of his premises to the burial of his own family or friends. It is but a just exercise of his dominion over his own property. Neither adjoining proprietors nor the public can complain, unless it is shown that from the manner of burial or some other cause, irreparable injury will result to them. It is quite an error to suppose that of itself a burying-ground is a nuisance to those living in its immediate vicinity. Much depends upon the mode of interment whether it can be justly asserted that in any event injury will result from it. The particular locality

and its surroundings must also be considered. Low, damp ground percolated by water will hasten decomposition and the soil will be saturated with its products. Dry, high, well-ventilated localities retard rather than hasten decomposition. If in a brief space of time there were numerous burials there might be great peril of the products of decomposition escaping into and polluting the atmosphere. So on and so forth.

In a very recent case an alleged expert was asked for his opinion upon the question of pollution by the products of decomposition, and he testified that an interred body will begin to cast off germs in a few hours after burial, that the germs will be highly poisonous, that later they are not quite so poisonous, but take on a permanent form and pass as albuminoids, and can be carried along by water supplies. His conclusion was that germs might be carried into the soil for a space of time running from five to ten years after the interment. So take a front seat and watch these albuminoids with slow and measured tread pass by. They must be some new species heretofore extinct because undiscovered. They will undoubtedly look like elephants, for given an existence and a name, such things often become as big as mammoths and frighten us just as much.

A Maine case presented many curious situations. In a sparsely settled region, a family burial-ground had been in the course of planting for forty years and contained about ten bodies, the last being interred about fifteen years before the litigation in question began. The owner then decided to move the graveyard to a spot which he tastefully graded and adorned. This place happened to be at a point about forty feet from the windows of a neighbor's sitting-room and also in plain view from his front windows and door. As first located the graves were only visible from the back rooms of the

neighbor's house. The neighbor alleged the new graveyard to be a nuisance for the reason that its proximity rendered his residence uncomfortable and the enjoyment of his property disagreeable. The discomfort would seem to have been that the reminders of the shortness of life and the end of it made the pleasures the neighbor was getting out of it bitter-sweeter from his front door than from his rear windows.

The court of last resort remarked that "there is no pretense that the plaintiff's physical health or his olfactories have in any degree been affected by any effluvia from the new graves." It would be manifestly erroneous and against the weight of the evidence to say that the water in his well, which is closely covered about the pump and has never been cleaned out, tastes bad and smells bad on account of a few dry bones buried seventy feet distant therefrom.

Assuming that there was no injury to the physical health or comfort of the neighbor the Court further asked, whether it can be a nuisance on account of its relative position with the neighbor's house, the cemetery inevitably meeting his view whenever he looked from the north window of his sitting-room or stepped from his door, and that thereby the comfortable enjoyment of his dwelling-house was interfered with. The answer was, "such discomfort is purely mental." Cemeteries are not necessarily even shocking to the senses of ordinary persons. Many are rendered attractive by whatever appropriate art and skill can suggest, while to others of morbid or excited fancy or imagination they become unpleasant and induce mental disquietude from association exaggerated by superstitious fears. All of which, in other words, means, that I may plant my graveyard where I please on my own premises, even though my neighbors see what I do not — weird ghosts disport themselves upon it. Or as a Court re-

marked, graves cannot offend the senses in a legal point of view. To become a nuisance the effect must be such as to interfere with ordinary physical existence, and the injury must be something more than fancy, delicacy or fastidiousness.

In a North Carolina case, in speaking of the power of a Court of Equity to restrain a nuisance which is likely to produce irreparable mischief, it was held that destruction of or an injury to the health of inhabitants of a city or town or of an individual and his family would be deemed a mischief of an irreparable character, yet when equity is asked to apply this law to cemeteries it will have to be clearly proved that a place of sepulture is so situated that the burial of the dead there will endanger life or health, either by corrupting the surrounding atmosphere or the water of wells or springs, before the Court will grant injunction relief.

There was such doubt in the mind of the Court whether the testimony proved the existence of a nuisance that the Court framed an issue to be sent to a jury to determine whether the maintenance of the burial-ground was in fact a nuisance.

In an Indiana case, where a city had purchased land for cemetery purposes, adjoining a tract on which there was a valuable spring claimed to be fed by subterranean streams passing under the cemetery land, it was held that it is impossible to establish correlative rights in subterranean streams, the situation of which is conjectural and unknown, and that it was improper to grant an injunction restraining the use of the lands for cemetery purposes on the ground of such conjectural injury to the spring.

One Court intimated soberly and without a suspicion of humor, that a cemetery is not to be classed with bone-boiling establishments, which counsel asking for the injunction somewhat facetiously advanced as an

authority. In the case cited it appeared that in a populous farming district a building was erected in which party began to manufacture fertilizing materials. The materials used were the carcasses of animals that have died of disease or have been killed, — bones, blood, flesh and entrails. The materials were cut up and placed in a large steel boiler called a "digester," and subjected to a temperature of from two hundred and fifty to four hundred degrees. The most improved machinery and appliances and the best processes known to the business were used, but notwithstanding all these precautions an offensive and disagreeable odor or stench was noticeable for a mile or two over the surrounding country. This stench, while it did not injuriously affect the workmen in the factory, yet to people generally was offensive and disagreeable, causing nausea, vomiting and loss of appetite, and rendered the house much less desirable than formerly as a place of residence. Such a business was declared to be *per se* a nuisance. Applying this authority to a cemetery case, the Court said is no reason why a cemetery should be declared a nuisance *per se*, for the circumstances are totally different.

In a very recent case, the bill in equity asked for an injunction to restrain the maintenance of a cemetery for burial purposes, from burying dead bodies therein, from polluting and contaminating the wells in the neighborhood and for the removal of dead bodies which had already been interred in the cemetery. It was alleged that the cemetery was on high ground and sloped towards the lands of the party complaining and that the wells were supplied with water from springs and underground streams flowing under the cemetery ground. The natural drainage of the cemetery land was towards the wells.

The attempt to show pollution of the wells

was in the following way: A physician placed a quantity of bromide of lithia in a hole in the bottom of a grave freshly dug at the distance of about two hundred feet from the well. In seventy-three hours afterwards, a trace of the lithia was found in the wells.

In considering the case, the Supreme Court held that the journey of the lithia from the grave to the well did not prove any pollution of the well by dead bodies. That there had been one hundred interments of bodies in the cemetery, all of which began to throw off poisonous germs several hours after burial and would continue to do so for a long while, yet there was no testimony of actual pollution of the water of the wells by emanations from dead bodies. That there was no proof of any disagreeable smell or taste of the water from such source. That the water was used, but there was no proof of any injury from its use. That on the contrary there was evidence that the water was used by neighbors and was as good as it ever was before the cemetery was established, and no injury could be traced to it.

There was evidence, additionally, bearing upon the question whether well-water supplied from underground streams could be polluted from the burial of dead bodies in the land. A witness spoke of living in Philadelphia in a property adjoining cemetery grounds containing hundreds of bodies. That the graveyard had been in use for seventy-five years. That a well on his land was constantly used. That three wells on the cemetery grounds were used. That the water had always been good and that he had never known or heard of any sickness or other bad effects from the drinking of the water of the wells. He further spoke of a well in Greenwood Cemetery, Brooklyn, where over three hundred thousand bodies are buried. That the well had been in use for years. That he had drank of its waters. That visitors go to

the cemetery and drink of the water. That he had never heard of any complaint of injury from the water. He gave it as his opinion that the use of the water of a well in a graveyard would not affect the health of the living to their injury, and that he had never known of any injurious effect from use of wells close to cemeteries. In this opinion he was corroborated by a physician.

The Supreme Court in conclusion drew attention to the circumstance that notwithstanding the manifest effect of the above testimony was to impugn and question the theory that the interment of bodies in a cemetery would necessarily tend to contaminate the water in near-by wells, yet no contradictory or countervailing testimony was introduced. Hence for the purposes of the particular record before them, the positive testimony of witnesses who have used the water in such wells and the opinion of competent disinterested witnesses, having experience and having made a study of the subject, remained without contradiction or dispute and must prevail.

It was added that no test of the water of the well was even made to show whether it had been contaminated with any deleterious matter coming from the cemetery grounds. The lithia test was neither conclusive nor satisfactory, because it proved nothing as to whether there were any unhealthy percolations from the cemetery grounds.

The Court further remarked if it is a fact that all cemeteries pollute the adjacent waters it would be a very easy matter to prove it, but in this case there was no such proof, not only as to this cemetery but as to any

cemetery anywhere. While it was admitted that there might possibly be such a condition of things, yet equity would not interfere upon inferences and theories. There must be actual proof by testimony, either that all cemeteries do naturally and necessarily pollute the adjacent waters, or else that in this particular case such pollution has actually taken place. Without such proof equity would not interfere.

For these reasons, among others, the bill was dismissed, which perhaps legally leaves our problem where we began, — is it good or evil that is interred with the bones. Which?

Willie might well ask why should bones pollute or contaminate if good is oft interred with them. Dissolution is only a changing of form. Everywhere life is dissolving to make way for new forms of life. It is a purely natural phenomenon and why should the process be highly poisonous? Why should the process pollute when all life is fostered and fed by that which feeds upon the process. It is simply completing the circle in which all things do work together for good.

If it is the good that lives afterwards, if it is the good that is oft interred with the bones, if it is all good, why the evil may be the good, not yet understood.

We leave our problem with you, trusting you will pardon the title. It is one of those things that will slip out unintentionally at times. They come when you are off guard. You never mean them. With the same breath in which they are born, you hope they will prove utterly harmless, and pray indulgence. Such is our hope and prayer.



## EARLY ENGLISH PROCEDURE.

BY M. E. E. KERR.

IN early English jurisprudence, if we may designate by that appellation anything so primitive and lacking in those elements which make for jurisprudence in our day, criminal law and criminal procedure monopolize by far the greater part. In early English procedure there were several well-defined steps of progress in its development, such as the institution and practice of *wergild*, which degenerated into private war and bloody feuds, the investiture of the people with the right of summary punishment; the law of *infangthief*—a procedure so summary as to scarcely deserve the name of procedure at all; and the law of purgation and *urtheil*, or ordeal. The latter is thought to have formed the first step towards our modern law and procedure. The latter gradually encroached upon and supplanted the others, and was in turn itself supplanted.

In early times the really efficient check upon crimes of violence was the fear of private vengeance, which degenerated into private war, bloody feuds, and anarchy. In the Anglo-Saxon law we find the institution of the *wergild*, according to which each man, whatever his station or walk in life, had a price fixed upon his life and the limbs of his body<sup>1</sup>

<sup>1</sup> It is to be noted that the Saxons preserved class-distinctions as rigorously as they were ever preserved by the Brahmins of India. Nithard, writing about 483, says the whole people were divided into three ranks, namely: 1. *edhilingi*, or nobles; 2. *frilingi*, or ingenuiles; and 3. *lazzi*, or serviles. Nithard's *Hist.* iv., 2. This distinction was carried into the *Capitulare Saxonum*, Boluze, i., 199-200, art. 3. See, Richthofen, *Zur Lex Saxonum*, p. 346. Tacitus divides them into the *nobilis*, the *ingenuus*, and the *servus* or *colonus*, which is the *eorl*, the *ceorl*, and the *let* of the old Kentish laws two centuries earlier.

Rudolf, writing about 863, says: "The race consists of four ranks of men; the noble, the free, the freedmen, and the *servi*. And it is established by law that no order shall in contracting marriage remove the landmarks of its own lot; but noble must marry noble, freedman freedwoman, serf handmaid. If any take a wife of different or higher rank than his own, he has to expiate the act with his life." Rudolf, *Translatio Sancti Alexandri*; See Pretz, ii., 674; Richthofen, *Zur Lex Saxonum*, 223-229; Waitz, D. V. G. i., 213.

Every life had its value, and according to that valuation must any one or his family and kindred pay, for its destruction, to the family and kinsmen of the man whose life was taken. According to that valuation, also, was the weight of his oath in court. Thus the oath of a *twelfhynd* man was worth six times that of a *twyhynd* man, and twice that of a *sixhynd* man. The price at which an injury was to be atoned for, varied in each of the Germanic races.<sup>2</sup> In the English kingdoms, in the tariff of *wergilds* the basis of calculation was the *wergild* of two hundred shillings, which marked the *ceorl*, *twyhynd*, or simple free-man. The thegn was worth twelve hundred shillings. The Britain, or *wealh*, was worth half as much as the Saxon, or Angle. If he possessed five hides, he was *sixhynd*; if he possessed but one, he was worth a hundred shillings. The higher ranks,—the king, archbishop, bishop, ealdorman, and *eorl*,—were estimated in multiples in a similar manner. The king's high *reeve* was worth twice the thegn, the bishop and earlman four times, the king and archbishop six times, *etc.*<sup>3</sup>

The exaction of these respective *wers* or head-pieces of the various ranks of early Saxon society, as has already been remarked, degenerated into private war, engendering bloody feuds and anarchy. To this succeeded the era when people were invested by law with the right of inflicting summary punishment on wrongdoers whose offences injured them personally. This was but a short step in advancement from private war; but to recognize the right of the injured husband to then and there put the adulterer to death, or of the owner of stolen property to inflict a

<sup>2</sup> See collection of tariff of *wergilds* in Robertson's *Scotland Under Her Early Kings*, ii., 275-283.

<sup>3</sup> Stubbs, *Const. Hist. Eng.* (2nd ed. 1875), vol. i., 161.

similar punishment on the thief, must be regarded as a nearer approach to law than to fight out their quarrels subject to a compulsory arbitration ending in the payment of a fixed sum, as in the *wergild*.

The Saxon laws are full of provisions conferring this right of summary punishment by execution by him who suffered the injury. This is illustrated by the laws of Ina,<sup>1</sup> of Æthelstan,<sup>2</sup> and even of Edward the Confessor.<sup>3</sup> The *Judicia Civitatis Lundoniæ*<sup>4</sup> provides: "That no thief be spared over xii pence, and no person over xii years whom we learn according to *folkright* that he is guilty and make no denial; that we slay him and take all he has." This document also contains provisions as to following thieves, and provides, in the seventh rule, "that he who should kill a thief before other men, that he be 12 pence the better for the deed and for the enterprise, from our common money."

This approaches very nearly to the law of *infangthief*, which is indeed a peculiar case of summary execution,<sup>5</sup> if not of justice, and

<sup>1</sup> "If a thief be seized, let him perish by death, or let his life be redeemed according to his *wer*." Again: "He who slays a thief must declare on oath that he slew him offending not his gild brethren." Ina, 12; Thorpe, *Ancient Laws and Institutions of England*, i., 111.

<sup>2</sup> "That no thief be spared who be taken *hand-hæbende* above xii years and above eight pence." According to another law of Æthelstan it would seem the proper course to kill thieves. "If any thief or robber flee to the king, or to any church and the bishop, that he have a term of nine days. And if he flee to an ealdorman, or an abbot, or a theane, let him have a term of three days. And if anyone slay him within that term let him (the slayer) make *bot* the *mund-byrd* of him whom he before had fled to. And flee he to such *soen* (jurisdiction) as he may flee to (take refuge in), that he be not worthy of his life but as many days as we above have declared, and he who after that harbors him (the thief) let him (the harbinger) be worthy of the same that the thief may be, unless he can clear himself that he knew no guile nor any theft in him." Æthel., iv., 4; Thorpe, i., 223.

<sup>3</sup> In these laws elaborate provisions are made for trying the question as to whether a person killed as a thief "*injuste intersectus sit, et injuste jacet inter latrones*"; in which case the body was to be taken up and reburied "*sicut Christianum*." Edw. Conf., xxxvi; Thorpe, i., 460.

<sup>4</sup> For this document see Thorpe, i., 229-243; for curious and interesting comments on same see, Coote's *Romans in Britain*, 394, *et seq.*

<sup>5</sup> Sir Francis Palgrave says: "Perhaps the name of legal procedure can scarcely be given with propriety to

was one of the franchises usually conceded to the lords of townships.<sup>6</sup>

*Infangthief* long survived the Conquest, but the exercise of the right was put under restrictions.<sup>7</sup> There is no record of the exercise of *infangthief* in England after the reign of Edward III., except in the northern borough of Halifax, where a judicature grounded upon the Anglo-Saxon customs subsisted until a comparatively recent era.<sup>8</sup> In the advance of early English jurisprudence *infangthief* was succeeded by the *tennantetale* (in the north of England) and *firth-borhs* (in the south of England) or frankpledges, under which all men were bound to combine themselves into associations of ten, each member of which association became security for the good behavior of each other member thereof, and was required to produce any one thereof charged with an offence, and on failure to so produce him, the remaining nine were required to make good any mischief the missing tenth had done.<sup>9</sup> This association in tens was known as a *tithing*,<sup>10</sup> and the head man who managed the affairs thereof was called *borhs-caldor*, or firth-borge-head, also tithing-man or "capital pledge." Whether the *tithing* was originally a defensive or a police regulation is purely a matter of conjecture,<sup>11</sup> as is also the fact as to whether the frank-pledge had become a

these plain and speedy modes of administering justice; they are acts deduced from the mere exercise of the passions natural to man, and the law consists only in the restrictions by which the power of self-protection and defence were prevented from degenerating into wanton and unprovoked cruelty." Vol. ii, p. 211.

<sup>6</sup> It is thus defined in the laws of Edward the Confessor: "*Justicia cognoscentis latronis sua est, de homine suo si captus fuerit super terram suam*." Edw. Conf., xxii; Thorpe, i., 452.

<sup>7</sup> Palgrave, vol. i., 210.

<sup>8</sup> *Id.*, 213.

<sup>9</sup> Madox, *Hist. Exch.*, 393; Palgrave, *Comw.*, i., 96.

<sup>10</sup> A tithing was the unite of local administration representing a subdivision of the hundred, and occurs at least as early as the time of Edgar. Edg., i, 2, 4.

<sup>11</sup> In some instances it was merely a personal association of ten men. See, *Judicia Civitatis Lundoniæ*, Æth., vi, 2, 8, §1.



fixture in the English law before the Conquest, or was imported into it by the Normans.<sup>1</sup> It is to be remarked that this early institution is still extant in a highly developed, though considerably modified form, for the ancient tithing corresponds very closely with the modern township or parish, and in it is to be found the germ, small though it be, of modern jurisprudence and procedure. Each man was required to belong to a hundred and a tithing<sup>2</sup> the same as he must now belong to a county and a township or parish; but the men of the township or parish are no longer "their brother's keeper" in the sense they were in the early English law; the tithingmen were standing securities for the good behavior of one another. If one broke the law, the other nine were required to hold him to right or make good his wrong. If they could not produce him, the "capital pledge," or head man, and two of his fellows, and the tithing-man and two others out of the three nearest *firth-boths* were required to purge their respective associations of complicity in the flight of the criminal, or make good the mischief done by him.

The courts at this time were in the nature of public meetings, attended by specified

<sup>1</sup> A law of Æthelstan (Æthel., ii, 2) enlarged by Edgar (Edg., iii, 6; iv, 3) required that every man should have a surety who should produce him in case of litigation, or answer for him if he were not forthcoming, and this law is reenacted by Cnut (Cnut, ii, 20) in connection with other police regulations. See, Gneist, *Self-Government*, i, 26.

Æthel., iii, 7, § 2 provides that in case a reeve does not warrant any one of his lord's men, the suspected man must find twelve pledges among his kindred who shall stand security for him. This has the appearance of a frank-pledge, but may have been merely the compurgatory obligation of the kin.

<sup>2</sup> A law of Cnut provides that "every freeman be brought into a hundred and into a tything who wishes to be entitled to *lad* and *wer* in case any one shall slay him after he is xii years of age. Let him not afterwards be entitled to any free rights be he *beath-fast*, be he follower, And that every one be brought into a hundred and in *borh*, and let the *borh* hold and lead him to every plea. Many a powerful man will if he can and may defend his man in whatever way it seems to him that he may the more easily defend him, whether as a freeman or as a *theoir*. But we will not allow that injustice." Cnut, ii, 20; Thorpe, i, 387.

"suitors," or members, who selected a representative body of twelve as a judicial committee of the court.<sup>3</sup> The court was summoned by verbal messengers sent throughout the district. The proceedings of the court partook of the native rudeness and simplicity of the people and the times. Neither scribes nor registrars attended the sittings of the court, and the memorials of the court reposed in the memory of the *Witan*, or judges, by whom the decisions and decrees were pronounced.<sup>4</sup> The procedure appears to have consisted simply of accusations and trials. The accusations might be made by the judicial committee of the court, by four reeves<sup>5</sup> of the township, or by a private accuser.<sup>6</sup>

The forms of oaths of accusation are given by Thorpe.<sup>7</sup> A sample by an individual accuser must suffice. One form ran as follows: "By the Lord before whom this relic is holy, I my suit prosecute with full folk right, without fraud and without deceit, and without any guile, as was stolen from me the cattle by N., that I claim, and that I have attached with N. By the Lord I accuse not N., either from hatred, or for envy, or for unlawful lust of gain; nor know I anything so other, but as I my informant to me said, and I myself in sooth believe that he was the thief of my property." The accused person denied, in general terms, his guilt, upon the following oath: "By the Lord I am guiltless, both in deed and counsel of the charge of which N. accuses me." This being done, the

<sup>3</sup> Evidently this was the forerunner of our modern grand jury. By the laws of Ethelred (Ethel., iii, 3; Thorpe, i, 294-5) it is provided that a *gemōt* be held in every *wcpentake*, and the twelve senior thanes go out, and the reeve with them, and swear on a relic that is given to them in hand, that they will accuse no innocent man, nor conceal any guilty one.

<sup>4</sup> Palgrave, *Comw.*, i, 143.

<sup>5</sup> See Cnut, 30; Thorpe, i, 393. The laws of William the Conqueror provide: "*Si quis in hundredo inculpatus purget se manu xii.*"

<sup>6</sup> See *Laws of Ina*, 64; Thorpe, i, 141-2; *id.*, 179-185.

<sup>7</sup> The form of the oath seems to have varied according to the nature of the offence charged.

question of guilt was decided, according to the character of the accused, by *lad* (compurgation) or by *urtheil* (ordeal). If the accused was of good character and "oathworthy," he was entitled to the *lad*; if the *lad* failed ("the oath burst"), or he was *tiht bysig* (of bad character), he was obliged to go to the *urtheil*, or ordeal.

The character of the accused was, therefore, in each instance a preliminary question, and the form of trial was fixed by that determination. Where the accused was found "oathworthy," he was "led to the plea" by his *borh*,<sup>1</sup> who had to swear the accused had not been convicted since a certain time.<sup>2</sup> In some cases oath was also required of "two true thanes of the hundred, or the reeve,"

<sup>1</sup> A law of Æthelstan provides that the Lord or the lord's steward "should answer for all his men." Æthel., ii; Thorpe, i, 217.

<sup>2</sup> Under Ethelred the oath was "that he has not failed neither in oath nor ordeal since the *gemot* was at Bromdun." Ethel., i, 1 Thorpe, i, 281. Under Cnut, "since the *gemot* was at Winchester." Cnut, ii; Thorpe, i, 393.

that the accused had not paid *thief-gild*. The accused was then entitled to choose whether he would have a "single ordeal" or a "pound-worth oath within the three hundreds for above xxx pence."<sup>3</sup> The single ordeal was handling a piece of red-hot iron of a pound's weight, or plunging the hand up to the wrist in boiling water. What was a "pound-worth oath," how many witnesses it required, or how it was determined who the witnesses were to be, are matters all specific knowledge of which has been completely lost, — were matters depending upon the custom of the time and were never incorporated into any of the early systems of written law. It does appear, however, that whatever may have been the number of witnesses, how determined upon, or from whence drawn, the *lad* or compurgators swore not to particular facts, but merely in general terms to their belief in the innocence of the accused.

<sup>3</sup> See Cnut, ii, 30; Thorpe, i, 393.

## THE WOOL-SACK AND WOOLENS IN THE REIGNS OF THE EARLIER EDWARDS.

By L. G. SMITH.

WE are prone in these days to slap each other on the back in congratulation at the improvement we have made in the methods of our ancestors. Perhaps those ancient worthies were somewhat "slow" compared with our modern rush, but a study of their laws will certainly demonstrate that they were usually correspondingly "sure."

Adulteration, that curse of the present age, was then strictly barred out. "Oleo" did not masquerade as the best creamery butter; a nutmeg was a nutmeg, not a lump of cunningly carved wood; cinnamon was cinnamon, not sawdust; and a middle-aged hen would have blushed at the insinuation

that all the eggs on the market were not produced by her kind, but, instead, might be the cleverly constructed artificial product of a degenerate inventor, warranted to do everything the original could do, except hatch and cackle.

The wool-sack, in the early days in England, kept a particularly protecting eye over the cloth manufacture. The Romans probably taught the Britons the crude art of using the hand loom, but up to the time of the Norman conquest the clothing of the common folk of the Isle was chiefly of leather, all fine cloths having been imported from the continent. Under the immediate successors

of the Norman William a few skilled weavers were introduced into the realm under the protection of the king, and gradually a set of laws was enacted in regard to the manufacture and mode of sale of the product of the new industry.

That the kings did not hesitate to avail themselves of all the perquisites which might possibly be coming their way in the woolen trade is shown by the fact that during the reign of Henry I., son of William the Conqueror, a law was passed authorizing the seizure and burning of all woolen goods made in England wherein Spanish wool was mixed with the English. This law was intended to encourage the production of the domestic article, as the king received an income in the form of a tax on English-grown wool. As the Spanish fleece was of a much finer grade the temptation to use it was great.

The law also determined where and how cloth should be made, certain towns being granted the privilege of manufacturing certain varieties, as broadcloths in Kent, kerseys and serges in Devonshire, *etc.*, and these privileges the particular towns guarded most jealously, hunting out any encroacher upon their rights and dragging him to summary punishment. But while the manufacturer was thus protected he was at the same time rigidly held to the production of honest goods by the appointment by the Court of a functionary dubbed the "aulnager," whose duty it was to inspect all the cloth made within his jurisdiction. A "nagger," he certainly must have been, a veritable thorn in the flesh of the tried woolen weaver who was never safe from his visits, when the precious bales of goods were subjected to a rigid overhauling as to quality, and measurement in width and length, every detail of which was regulated by statute.

That these dignitaries knew the gentle art of the extended open palm behind the

back is demonstrated by several cases noted where, having been found guilty of bribe-taking, certain aulnagers were deposed from office. In fact the official history of those early days reads surprisingly like the morning paper, with the old titles substituted for those of our city officials.

Any sharing in the duplicity of the inspector and taking advantage thereof met with swift visitation of justice on the offending town, as is shown by a case mentioned in the reign of Richard II., where various manufacturers in the counties of Somerset, Dorset and Gloucester were found guilty of cheating. The quaint phraseology of the time is amusing. "Forasmuch as divers plain cloths wrought in these towns be found tacked and folded together for sale, of which a greater part be broken, bruised and not agreeing in color, neither according in the breadth nor in no manner to the same cloths which shew outwards, but falsely wrought to the great damage and loss of the people, insomuch that merchants buying the same and carrying them out of the realm to sell to strangers, thereby subject themselves to many dangers; perchance of being slain or imprisoned and put to fine and ransom," *etc.* The offending weavers were severely dealt with and were forbidden to fold and tack their goods before export as heretofore, having proved themselves not trustworthy. This is somewhat comforting, as it proves that the idea of putting the large peaches at the top of the basket where they "shew outwards," and the nubbins at the bottom, out of sight, is not of Yankee origin.

Certain prescribed methods and tools were to be used in making the cloth or the offender was subject to a stay in jail and a payment of a good round fine. A yard was to consist of the standard yard and the breadth of a man's thumb, in all about thirty-seven inches, and woe to the man who resisted the

visitation of the aulnager with his measuring rod. The fine for the first offence of this character was five pounds, the second, ten, and for the third the offender had to stand exposed in the pillory in the public square or market-place of the town.

Weight and coloring matters employed were also established by law, and the use of false weights, or the application of foreign substance to increase the weight of cloth were both subject to fines. After the inspection, the aulnager applied his official seal to the bales of goods, to tamper with which was punishable by a heavy fine which was divided into equal parts between the king, the inspector and the poor of the parish where the offence was committed.

The law particularly insisted that cloth should be shrunk before sale, and never in those good old days in "Merrie England" could have occurred the following episode, which is told of a certain Yankee woollen firm. Their agent, having penetrated a western State, found in the midst of the wilderness an old frontiersman with his five sturdy sons engaged in the painfully laborious process of tearing the huge stumps from the virgin soil. To this family the agent sold ten red woollen shirts, warranted non-shrinkable. On his return the following spring, he found the clearing vastly widened, and the woodsman anxious for a large supply of his wares. On inquiry as to how they managed to use so many during the winter the old man replied: "Wall ye see, we jest fixed up a good stout kind o' framework over a pesky

stump thet'd take us tew days to hist by hand. Then we'd hang one of them patent non-shrinkin' shirts o' yourn over the top of the frame, fastenin' the sleeves to the stump. Then Silas, he jest pours a pail of water on the shirt, an' up she comes a bringin' the stump with her slicker'n a greased cat; an' the best on't is they keep on shrinkin' so's we kin use 'em over an' ag'in till they git so small the ol' woman finishes 'em up on the baby." In the days of the early Edwards that agent would have been subject to "many dangers, perchance of being slain," and the head of his firm would have been sent to cool his heels in the county gaol.

While so rigidly bound to be honest, the manufacturer of those times was blest in one particular, in that the law saw to it that his soul should not be harassed by strikes among his workmen. It was enacted that any weavers of cloth guilty of entering into a combination for advancing their wages, for lessening the usual hours of work, or for departure before the end of their agreed term of service should be sent to the House of Correction for three months. The government, on the other hand, kept a kindly eye on the hireling by statutes stipulating that the employer was to pay his workmen full wage in money promptly or be subject to a fine of ten pounds.

Under these restrictions the inhabitants of England surely did not suffer the shivers consequent on the tying up of one of the heat-producing industries, as the citizens of free America suffer in this enlightened age.



## A QUESTION OF DISPUTED GUARDIANSHIP.

BY ADOLPH MOSES.

A PECULIAR case came before Lord Chancellor Hardwicke, in March, 1737, as reported in 2 Swanston's Reports, 533,<sup>1</sup> which proves the effect of the State Church upon the Court of Chancery.

Mrs. Mellish was the daughter of Mr. Da Costa, and having married Mr. Villareal, had by him two children, respectively eight and nine years old. Both parties were Jews. Upon the death of Villareal, a bill was brought in the Chancery Court, touching the children's estate, and the fortune of the two children appeared to be 27,000 pounds each.

In the course of time a marriage treaty was contracted between the widow and one Mr. Mendez. Thereupon Mr. Da Costa, her father, prevailed on his daughter to assign over to him the guardianship of the two children, with the agreement that if they died during their minority, he should have a moiety of their fortunes. Afterwards it came to pass that the treaty of marriage was broken off, and the widow married a Mr. Mellish, without her father's consent, and became a Christian. Da Costa, having possession of the children, refused the mother permission to visit them without a French woman being with them. This led to a suit in chancery, wherein Mellish and his wife preferred a petition to restore to her the guardianship of the children; that she might have liberty to see them without intervention, alone, with the privilege to the children to visit her.

Another petition was presented on behalf of the two children, praying that the court would give proper directions for their education, and this petition met with final success, as will further appear.

<sup>1</sup> Also reported under title of *Da Costa Villa Real v. Mellish*, 1 West's Cases Temp. Hardwicke, 1736-1739.

Mrs. Catherine Mellish presented her affidavit to the effect that she was baptized on the 28th of March, 1735; that her father, Mr. Da Costa, was a Jew.

Counsel for Mrs. Mellish insisted that the assignment of the guardianship by the mother, was invalid; that it was for the benefit of the infants and could not be transferred, nor could it be renounced. It was also argued that the children had the right to the mother's care.

As to the religion of the infants, counsel argued that, although that should be the choice of every person, yet, as the children cannot choose, and as the method of education would naturally affect their religious principles, care should be taken of their education; that, considering the temporal advantages only of the children, their education in Judaism would affect their fortunes, and the consequence of the children continuing with the grandfather, who would educate them in a different religion from the parent, would lay a foundation for differences in the family which is too common, by reason of the difference in religious principles, and especially so in Jewish families.

Counsel for the children argued that the son under the English law, would be under an incapacity as a Jew, could enjoy no offices, and the daughter, as a Jewess, might be married improvidently.

The Attorney General appeared for Mr. Da Costa, stating that his client had had the care of the children under the deed of agreement, since 1734, without any complaint by them, or by the mother, prior to the filing of the petition. He conceded that the guardianship could not be assigned in law, but the mother might agree that another proper per-

son should exercise authority over the children.

As to the claim that the mother is now a Christian, the Attorney General admitted that this is a proper argument, but "we are not to be wiser than the law." The taking away of the children and putting them under a different education, was thought one of the hardest parts of the prosecution of Protestants abroad. If the court should interpose in such cases, he was afraid that no children would be suffered to be educated otherwise than according to the legal establishment. According to the statute of 1 Anne, chap. 30, it was provided that children should be left free in their choice of religion.

The Attorney General also pointed out that the deed between Mr. Da Costa and his daughter was dated May 3, 1734, wherein she had agreed that if her two infant children died intestate, the grandfather should be entitled to an equal moiety with her, and that she and all persons who would be entitled to the guardianship of the children, should permit Mr. Da Costa to have the care of their persons and estates.

On the back of the deed was an endorsement dated March 17, 1735, by Mr. Mellish and his wife, whereby they ratified the deed. A deed poll signed by Mr. Da Costa was also produced whereby he agreed to permit Mrs. Mellish to visit the children at his house; and he averred that he never refused the mother permission to visit the children.

Other counsel on the same side argued that the guardianship of the mother was little regarded by the common or statute law of the kingdom, and wisely so, because the mother, by her second marriage, puts herself under the power of another, and her affections will often be alienated from the children of the first husband to those of the second. The true point before the court was whether it would change the education

of the children so as to change their religion.

The Lord Chancellor, in delivering his judgment, avowed his reluctance to determine questions of this sort in family disputes, the more disagreeable, where they relate to religious matters, — but when it becomes necessary, he must do it.

As to the mother's claim, before the deed of 1734, the right was clearly in her. She had a right to the custody of the persons, and care of the education, and the grandfather had no right to interpose otherwise than as the mother, being his daughter, owed a duty to him; but the mother had no right to assign the guardianship.

As to the deed of May, 1734, a guardianship is no more assignable in equity than at law. The deed is only an agreement that the grandfather should have the actual care and education of the children, and that she should not interpose. The deed does not use the words of assignment.

It seems a little strange for parties to come into a court of equity and pray contrary to their agreement, and the court cannot set it aside in this summary way. No imputation on the behavior of Mr. Da Costa had been urged, and there was therefore no ground to relieve Mrs. Mellish as prayed in her petition, which was therefore dismissed.

But the Chancellor also had the petition of the infants before him, and that received another consideration. As the Chancery Court gives directions touching the estate of infants, it ought to interpose from whatever hands the petition comes, though from a mere stranger.

There are here two questions, continued the Lord Chancellor: Has the court power to give directions to deliver the children to the mother? Has it discretion in doing so?

As to the first question, the court has the power without doubt. Secondly, — as to

the discretion of the court,—it must be held that the Chancellor is bound to interpose. As the deed passed no right to her father, it still remained in the mother of the children, and whatever the mother may have done, if she neglects, the children may complain, or any one for them.

The Chancellor continued :

“ It has been said on the point of religion, that he holds the true state of the question to be whether this court shall not take the infants out of the hands of a person who has no right of guardianship, and put them into the hands of a person who has the right, and is of the religion of this country. I do not by any means intend to declare to the contrary, to take the children of Jews from their parents, any farther than is required by the act of parliament. It has been said that the father of the children was a Jew. I see nothing to prevent the father from devising ; but the father being dead, and not having

disposed of the guardianship, the father's right devolves to the mother, and she is here of the religion of the country, and therefore no reason to take the right from her. As to the statute, 1 Anne (1701), though the present case is not within the provisions of it, yet the reason weighs ; for, if a Jew child becomes Christian the act of parliament takes away the father's power, and as the children here are of such tender years that they cannot choose for themselves, should not the court interpose to assist in restoring them to their rightful guardian ? No person has greater regard to conscience, but holds likewise that the Christian religion is part of the law of the land, and so held and declared by Lord Chief Justice Hale, in the case of *King v. Taylor*, 1 Vent. 193 ; 3 Keb. 107.”

The Lord Chancellor therefore ordered the children to be delivered forthwith to the mother.

### THE FINAL TRIAL OF THE SIFTON MURDER CASE.

READERS of THE GREEN BAG will recollect that in the issue of November last year there was given a short account of the trial, at London, Ontario, Canada, of Gerald Sifton on a charge of murdering his father, which trial then proved abortive, through the disagreement of the jury, it being currently reported that nine were for conviction, three for acquittal. The case was tried again during the first week of last month, November, with the result that the jury brought in a verdict of “ Not guilty.”

The case being now concluded one is more at liberty than last year to comment upon the remarkable incidents which it presents.

The facts proved were as follows : Joseph

Sifton, an elderly widower, living by himself, had an only son Gerald, the accused, who was married and lived elsewhere, though near to his father : Mary MacFarlane, a young girl, lived in Gerald's house, and helped Gerald's wife in the house and on the farm. Mary had been seduced by Joseph Sifton, and believed herself to be pregnant by him ; a marriage had been hastily arranged between them to take place on Saturday the 30th of June, 1900, the day of which the old man met his death. This arrangement came to Gerald's knowledge on the evening of Friday the 29th, when the old man drove over to Gerald's house, and took away Mary to her mother's house, where they stayed for several hours. After leaving there they drove back

again to Gerald's house, but before leaving the buggy, a man named Edgar Morden spoke to them; what passed was given in evidence; but immediately afterwards the old man and Mary drove to Edgar Morden's house, and stayed there that night. What took place at Edgar Morden's house is uncertain; but, later on, Edgar Morden produced a will in his own writing, dated that day, purporting to be signed by Joseph Sifton, leaving all his property to Mary MacFarlane, and appointing Edgar Morden sole executor; the will purported to be attested by Edgar Morden and his wife. At a subsequent trial to test the validity of the will both Edgar Morden and his wife failed to appear, and the jury found that the signature to the will was a forgery.

It was proved that during the time the old man and Mary were at her mother's house, Gerald went to see another man named James Morden, a distant cousin of Edgar's; James Morden afterwards swore that Gerald that night told him of his father's intended marriage, and offered him \$1,000 to do away with the old man that night, but that he refused to have anything to do with it; whereupon Gerald asked him for the address of the lodging in London where his brother Martin Morden lived. Martin was up to that time engaged to be married to Mary. It was proved by other evidence that Gerald did go to London that night; and Martin Morden has sworn that Gerald came to him there, and offered him a bribe to go with him to try to induce Mary not to marry the old man, and that, on Martin's refusal to have anything to do with it, Gerald said:—"We are going to put up a hay-fork," and asked Martin if he would help him to put it up, adding:—"We have set a trap for the old man, and if he falls into it, it would only take two or three raps on the head with a hammer to finish the old man"; and that on Martin

again refusing to have anything to do with it Gerald produced a small phial from his pocket, and said:—"If one thing will not work another will." Gerald returned home early in the morning of the 30th; the actual time of his return was disputed.

The motive assigned for the alleged murder was that Gerald was his father's only child, and as there was considerable property, his father's marriage would make a great difference in his expectations, especially if, as was believed, the girl he was about to marry was then pregnant by him.

On the morning of Saturday, 30th of June, the day fixed for the marriage, Joseph Sifton and Mary came back together to Joseph Sifton's house; they were seen by one witness; shortly after their arrival Gerald and Walter Herbert came, and Joseph Sifton was asked to go to the barn to give directions as to fixing a hay-fork; he went reluctantly, and while there he sustained injuries which cost him his life; he was taken into the house and lingered unconscious for several hours, and died. What occurred at the barn is known only by the evidence of Walter Herbert, given at the previous trial last year, and repeated last month, to which we refer later on.

The case when it happened was regarded as an accident; it was stated by Herbert and Gerald at the time to be an accident, a fall from a beam of the barn; the doctor who was called in gave his certificate to that effect, believing at that time that it was an accident; no autopsy was held at the time, and the body was buried. Afterwards suspicions arose, investigation was set on foot; both Herbert and Gerald were arrested together at the end of July, and Herbert then said, "Yes, I am guilty." Both men were indicted and arraigned together before the late Justice Rose, at the assizes of September, 1900, when Gerald pleaded not guilty, and Herbert pleaded guilty. Gerald's trial was



postponed, and Herbert's sentence deferred. Shortly afterwards Justice Rose died.

After postponements Gerald was put on his trial before Justice MacMahon in the fall of 1901, when Walter Herbert and James and Martin Morden appeared and gave evidence, with a formidable array of medical experts on both sides, who were, as might be expected beforehand, contradictory in their views. The jury disagreed. Since then James and Martin Morden left the country, and are now living at Davenport, Iowa; and it may be mentioned that an act has been passed for Canada limiting the number of expert witnesses as to any one point to five on either side.

After further postponements Gerald Sifton was again put on his trial before Mr. Justice Britton at the beginning of last month (November). The Crown gave evidence of the absence from the country of James and Martin Morden, and of the failure of all efforts to procure their appearance; thereupon their evidence as given last year was read. The medical expert evidence was reduced to five on each side, and was, as before, contradictory. The principal witness was Walter Herbert, the only possible witness, besides the accused himself, to the fact which caused the death. Herbert repeated the evidence given by him at the trial last year; told of a conversation with the accused early on the morning of the 30th, at which the accused offered him a reward to go with him and help him to murder the old man, and to be prepared to testify that it was an accident; of the actual blows struck by each of them on the old man's head with an axe; of

his being stunned by the blows, and thrown out of the barn on to the ground below, when more blows on the head were given to finish the deadly work.

The theory of the defence was that the death was accidental; that the confession made by Herbert and the evidence of James and Martin Morden, were parts of a scheme concocted by Edgar Morden, the forger of the will, to draw money from the accused; that Herbert's confession was "something that seized Herbert like a nightmare, and, imprinted on his mind, it remains until he conceives it to be true"; and lastly that Herbert's evidence must be untrue, because the appearance of the skull as deposed to by those who made the autopsy, was inconsistent with the many blows by the axe deposed to, but was consistent with an accidental fall from the beam of the barn as stated at the time of the death.

After three and a half hours' deliberation the jury came into court and said there was no chance of their agreeing; but after being locked up again for not quite half an hour they again came into court, this time with a verdict of "Not guilty."

The words addressed by the judge to the accused are significant, and suggestive. "The jury have taken a very merciful view of your case, and they find you not guilty; you are therefore discharged."

So Gerald Sifton goes forth acquitted, while Walter Herbert will have to be brought up to the bar of justice next January to receive the sentence of death on his own plea of "Guilty." Proving once again that the Law is a fickle jade.



GILBERTIAN LAWYERS.

THE Law and the Drama have often been close allies. Mr. Justice Talfourd wrote four tragedies, one of which was produced by Macready, and enjoyed a fair measure of success. His Honour Judge Parry, to whom belongs the distinction of being the only judge who has contributed to the stage whilst occupying a seat on the Bench, is the author of two plays, "England's Elizabeth," which enjoyed a successful run at Manchester about eighteen months ago, and "Katawampus," which amused many a juvenile audience in London last Christmastide. Mr. W. S. Gilbert, Mr. Sydney Grundy, Mr. Herman Merivale, and Mr. Anthony Hope all practised at the Bar before they wrote for the stage, and many another name might be added to suggest how much the Drama owes to the Law, but Mr. Gilbert's name alone is sufficient to indicate how deep the indebtedness is. Of all those who have deserted Themis for Thespis, none has ever turned his legal training to better account than has the author of "Iolanthe." Such dramatists as Mr. Sydney Grundy and Mr. Anthony Hope take no delight in weaving legal plots. That is an occupation which they wisely leave to playwrights with no knowledge of its dangers. But Mr. Gilbert, who knows the law well enough to know how to laugh at it, is never happier than when aiming his shafts of wit at the profession of which he was once a practising member.

Judges, barristers, solicitors—all three branches of the legal profession come in for their share of satire in the Savoy operas:—

The Law is the true embodiment  
Of everything that's excellent.  
It has no kind of fault or flaw,  
And I, my lords, embody the law.

So sings the Lord Chancellor in "Iolan-

the," perhaps the best of all Mr. Gilbert's legal characters. Nobody but a legal dramatist could have created the interesting problem which confronts this "highly susceptible Chancellor" who has fallen in love with a ward of Court. "The feelings of a Lord Chancellor who is in love with a ward of Court are not to be envied. What is his position? Can he give his own consent to his own marriage with his own ward? Can he marry his own ward without his own consent? And if he marries his own ward without his own consent, can he commit himself for contempt of his own Court? And if he commit himself for contempt of his own Court, can he appear by counsel before himself to move for arrest of his own judgment? Ah, my lords, it is indeed painful to have to sit upon a Woolsack which is stuffed with such thorns as these." Not less amusing is the account given by this "constitutional guardian" of "pretty young girls in Chancery" of the "new and original plan" on which he determined to work "when he went to the Bar as a very young man":—

I'll never throw dust in a juryman's eyes  
(Said I to myself, said I),  
Or hoodwink a judge who is not overwise  
(Said I to myself, said I),  
Or assume that the witnesses summoned in force,  
In Exchequer, Queen's Bench, Common Pleas, or  
Divorce,  
Have perjured themselves as a matter of course  
(Said I to myself, said I).

It is, be it noted, an "equity draughtsman" who thus determines to conduct common-law cases with scrupulous fairness, but this, perhaps, is to be counted as another proof of Mr. Gilbert's humour. The following verse is intended to apply to the Bar as a whole:—

Ere I go into Court I will read my brief through  
(Said I to myself, said I),

And I'll never take work I'm unable to do  
 (Said I to myself, said I).  
 My learned profession I'll never disgrace  
 By taking a fee with a grin on my face,  
 When I haven't been there to attend to the case  
 (Said I to myself, said I).

Gilbertian judges are fond of indulging in reminiscences of their forensic days. Mr. Gilbert seldom aims his shafts of wit at the Bench, though *Ko Ko, in "The Mikado,"* includes in his long list of social offenders who never will be missed, "That Nisi Prius nuisance, who just now is rather rife, the Judicial Humorist." He is accustomed to make his occupants of the Bench the vehicles of his satire on the methods of the Bar. Even the judge in "Trial by Jury"—"and a good judge, too"—is chiefly occupied in explaining how he came to be a judge. He fell in love with "a rich attorney's elderly, ugly daughter," who might "very well pass for forty-three, in the dusk, with a light behind her," and that rich attorney promised he should reap the reward of his pluck "at the Bailey and Middlesex Sessions."

The rich attorney was good as his word,  
 The briefs came trooping gaily,  
 And every day my voice was heard  
 At the sessions or Ancient Bailey.  
 All thieves who could my fees afford  
 Relied on my orations,  
 And many a burglar I've restored  
 To his friends and his relations.

Members of the Bar figure but little in Mr. Gilbert's plays. Almost the only bar-rister his wit and fancy have created is Sir Bailey Barre, Q.C., M.P., in "Utopia," of whom Princess Zara sings:—

A complicated gentleman allow me to present,  
 Of all the arts and faculties the terse embodiment,  
 He's a great Arithmetician who can demonstrate  
 with ease  
 That two and two are three, or five, or anything you  
 please;  
 An eminent Logician who can make it clear to you  
 That black is white—when looked at from the  
 proper point of view;

A marvellous Philologist who'll undertake to show  
 That "Yes" is but another and a neater form of  
 "No."

This description of his marvellous powers is evidently not displeasing to the honourable and learned gentleman, for he is candid enough to add:—

All preconceived ideas on any subject I can scout,  
 And demonstrate beyond all possibility of doubt,  
 That whether you're an honest man or whether  
 you're a thief  
 Depends on whose solicitor has given me a brief.

Solicitors take a legitimate pride in the fact that Sir Henry Fowler was the first practising member of their branch of the profession to become a Cabinet Minister. Long before, however, Sir Henry Fowler became a Secretary of State for India, the author of "*H.M.S. Pinafore*" perceived how excellent a stepping-stone to the post of First Lord of the Admiralty was a stool in a solicitor's office. Sir Joseph Porter, who, while an office boy "polished up the handle on the big front door," contrived to make his mark even as a junior clerk in an attorney's office.

In serving writs I made such a name  
 That an articulated clerk I soon became;  
 I wore clean collars and a brand-new suit  
 For the pass examination at the Institute.  
 And that pass examination did so well for me,  
 That now I am the Ruler of the Queen's Navee!

Two other members of the solicitor branch of the profession have been admitted at the Savoy. There is the notary in "*The Sorcerer*," who, "dry and snuffy, deaf and slow," is "everything that girls detest," and there is the more attractive notary in "*The Grand Duke*," who sings of the Prince who "passed an Act, short and compact, which may be briefly stated."

Unlike the complicated laws,  
 A parliamentary draftsman draws,  
 It may be briefly stated.

One of the best pieces of satire in Mr. Gilbert's plays is to be found in "*The*

Mountebanks," where, in singularly ingenious rhymes, he explains why Ophelia ought to have instituted a breach of promise action against the melancholy Dane.

Ophelia to her sex was a disgrace  
Whom nobody could feel compassion for.  
Ophelia should have gone to Ely Place,  
To consult an eminent solicitor.  
— *The Law Journal*.

## ENGLISH PRISON RULES AND REMISSION OF SENTENCES FOR GOOD CONDUCT.

BY JOHN MILLER.

**M**OST people will agree that it is ridiculous that a judge cannot pass whatever sentence he feels justified in pronouncing and have that sentence carried out according to the severity of the same; but it appears from a memorandum, drawn up by the present Chancellor of the Exchequer, when Home Secretary, that it is necessary for the judge to pause and consider the Prison Rules before he passes concurrent sentences.

It should be borne in mind that the maximum remission obtainable for good conduct is one fourth of the sentence for male convicts, and one third for female convicts.

It appears from the facts contained in the memorandum that two concurrent sentences either of imprisonment or penal servitude are carried out in every respect in the same manner as a single sentence; but that a term of imprisonment served concurrently with a term of penal servitude has the effect of preventing the prisoner from earning, as soon as he otherwise would, the number of marks which entitles him to be discharged on license!

### PRISON RULES. DIFFERENCE BETWEEN PENAL SERVITUDE AND IMPRISONMENT.

Every male prisoner sentenced to penal servitude shall pass the first six months of his sentence in separate confinement. (Convict Prison Rules, 31.)

Every male prisoner, not being a juvenile offender, if sentenced to hard labour, shall for the twenty-eight days or the whole of his sentence, if it is for less than twenty-eight days, be employed in strict separation. (Local Prison Rules, 39.)

In all cases where concurrent sentences of imprisonment and penal servitude are passed, on the same man, for different offences the result is:—

(a) He is necessarily kept for six months in separate confinement; and

(b) While he is serving the concurrent sentence of imprisonment, the power to earn remission of his sentence of penal servitude is suspended. (Local Prison Rules, 37.)

### EXAMPLES.

A. is sentenced to concurrent terms of four years' penal servitude and twelve months' imprisonment. He serves in a local prison six months in separate confinement; then also in a local prison serves the second six months of his sentence of twelve months, of which he can earn a remission of one fourth (making ten and one-half months in the local prison) and is then removed to a convict prison to undergo the unexpired term of three years, one month and a half of his sentence of four years' penal servitude. Of this he can earn remission of one fourth (say nine months eleven days). The effect,

therefore, of the concurrent sentence of imprisonment is that the prisoner is, at the minimum, three years two months and about nineteen days in prison instead of three years.

B. is similarly sentenced to concurrent terms of four years' penal servitude and six months' imprisonment. He serves six months in separate confinement and is then removed to a convict prison where he earns remission of one fourth of the remaining term of three and a half years' penal servitude. The effect of the concurrent sentence is that he is, at the minimum, three years one month and about fifteen days in prison instead of three years.

#### LIFE SENTENCE.

With regard to life sentences, to which, of course, the rules as to remission do not apply, the rule now is that each case is specially submitted to the Secretary of State after twenty years, and considered on its merits; but no promise is given to the convict of release at that period, and in certain cases, where a death sentence has been commuted to penal servitude for life, the license has not been granted after twenty years.

#### THE LADY FRIEND.

It is not generally known that there are

only two ladies employed by the Scotland Yard police authorities, to visit "ticket of leave" or licensed prisoners. These ladies have quite a difficult task to perform and have sometimes to go into the slums, and sometimes to the West End of London. Therefore their dress is always neat and lady-like. Nobody knows who they are. Sometimes they go alone, sometimes together. They call to see these prisoners as friends. It can easily be understood that if a girl, employed as a servant, had to obtain an afternoon off to go to Scotland Yard, or was seen going to a police station in the neighbourhood, to report herself, it might very quickly come to the ears of her mistress that she was a convict, thereby losing her her situation; but no mistress objects to the "lady friend," who is well bred and well educated, calling on her servant; but on the contrary is pleased to find her servant knows such a highly desirable lady. There are no rules and regulations concerning the duties of the "lady friend" as there are for policemen and other recognized officers, and therefore little or nothing is known of these ladies, except by those who are immediately concerned in their enquiries.



# The Green Bag.

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor,  
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

*The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.*

## NOTES.

SUPERINTENDENT: "It is our usual custom to let a prisoner work at the same trade in here as he did outside. Now, what is your trade?"

PRISONER: "Please, sir, I was a traveling salesman."

IN the days of the "Old Bench," as the Supreme Court of years past is called by the Tennessee bar, two lawyers of some note, who thoroughly detested each other, were trying a case in the highest court, when an angry controversy arose. They were fined for the language they used, but were not satisfied.

Soon after leaving the court-room they engaged in a fierce fight, during which one of them severely bit the other's fingers.

The matter became known to every lawyer in town, and to the judges of the court; but little was said about it, in deference to the feelings of the participants.

The next morning the wounded man appeared in the argument of a case, his hand in a sling. His enemy sat as a listener.

The Chief Justice seemed surprised on looking at the sling, and said, in sympathetic tones, "Brother Blank, you seem to have met with an accident. I hope it is nothing very serious."

"No, sir, I thank your Honor; nothing very serious — nothing serious at all — just dog bite, by a very insignificant dog, too."

THE trials and tribulations of the western judge are many. Their judgments, decrees and rulings on evidence are not only criticised, but movements of their bodies are often misconstrued. In an Iowa court recently a lawyer was urging a decree of divorce before Judge Thompson of Cedar Rapids. The attorney in arguing

his case became both earnest and eloquent and emphasized his statements by striking the table with his hand with great force. He paused a moment and then said:

"I see your Honor shakes your head as to that statement, but I desire to reaffirm what I have remarked, notwithstanding your Honor has given dissent."

The Court retorted:

"I have not in any manner intimated how I should construe the evidence or what my decision shall be in the case, and such remarks are wholly uncalled for."

"You shook your head."

"That may be true," the Court promptly replied; "there was a fly on my ear, and I reserved the right to remove it in any manner I saw fit. Proceed with your argument."

THE Paris papers recently reported a law suit which had in it much to interest the curious. The case was tried at Norbonne in the south of France and lasted throughout the entire day.

The complainant in the case testified that he was one day dining on the "terrace" in front of the restaurant, enjoying the salubrity of the air as well as the tastily-cooked food placed before him. He had just commenced to eat his soup, which he found too hot for his palate. While waiting for the soup to cool he took from his pocket a roll of bills which he had received in payment of a bill.

In counting the money he accidentally dropped a hundred-franc bank-note into his soup. He took it out of his plate with a fork, and sent the soup away; but the bank-note was saturated with the greasy liquid, and he laid it down on the tablecloth to dry.

He was partaking of the second course, when a sudden gust of wind blew the note off the table. He ran after it, but a wandering dog, which showed every manifestation of hunger, seized it. The taste of the soup on the paper

made it palatable to the cur, and it was swallowed in an instant.

The complainant, though bursting with rage, swallowed his emotion, and used all his persuasive power in an effort to get the dog to come near him. "Good doggie! Come here!" he exclaimed in his softest tones of wheedling endearment. The animal, well pleased with itself, wagged its tail and got near enough for the complainant to read the name engraved on the collar. When he had made a note of the name and address of the owner of the dog, he raised his foot and hastened the dog's departure. Then he sought his lawyer and brought suit against the dog's owner for the restitution of the hundred francs. After listening to the evidence and the learned arguments on both sides the court decided that the owner of the dog must pay the other man the money, holding that the dog being property, the owner must be held responsible for the act committed by the animal.

A NUMBER of years ago suit was brought against the cashier of the State Bank of Iowa Falls, to recover an alleged deposit, which deposit the bank denied. During the trial at Eldora, the defendant's attorney made a very convincing argument for his client, and took pains to tell the jury of his client's high social and religious standing, and of the confidence of the people which he enjoyed, and endeavored to impress upon the minds of the jury that the defendant was not the kind of a man to make a mistake in the handling of other people's money.

Tom H. Milner, then, as now, a witty as well as a very shrewd lawyer, represented the other side, and in addressing the jury said:

"Gentlemen, I heartily concur in what my brother has said of the defendant; I agree with him in each and every statement that he has made pertaining to Mr. —'s good self; but I would have you consider deeply this one fact, — Canada is full of just such men."

IN the days of the Ku Klux Klan many irregular bands of lawless men terrorized sections of Tennessee in the name of that order. Rigorous laws were passed in the effort to suppress it. One of these disqualified any person proven to be a Ku Klux from giving testimony in courts of justice.

Judge R— was a loyal east Tennessean, a man of the people, a doughty enemy of the Ku Klux, but an ardent member of the Baptist church, which was very strong in that section of country.

One day an old man from the outlying district appeared in court as a witness, and was about to take the stand when the judge stopped him, saying, "My friend, before you take your seat in the witness chair I would like to ask you a question or two. Do you belong to any secret order, society or organization?"

The man did not seem to comprehend the judge's purpose at all, and dreamed not that he was under suspicion of being a Ku Klux. He turned an honest face upon his questioner, looked him straight in the eye, and made answer:

"W-a-l, jedge, I reckon I don't to say 'xactly belong to no secret or-gan-ization, kase how I don't belong to no or-gan-ization 't all, 'ceptin' the Old Hardshell Baptist church; an' I reckon I hain't hardly fitten to belong to hit."

He was allowed to take his seat in the witness chair without further question.

"JEDGE," said the colored prisoner, "is I expected ter tell de truth?"

"Of course you are!"

"Well, then, des go ahead en sentence me fust!"

JUDGE CAVE J. MCFARLAND, one of the pioneers of the Iowa bar, was an odd character, although one of the brightest men that ever presided over the courts of the eleventh judicial district. Many anecdotes are related of him. He had nicknames for many of the attorneys who practised in his court in this county. James W. Wood, ex-Clerk of the Supreme Court of Iowa, he called "Old Timber," and the late Governor Enoch W. Eastman, of Eldora, he called "Old Spot," from the fact of his being marked with small-pox. On one occasion while "Old Timber" was addressing the court an ass belonging to Governor Eastman walked up near one of the windows and set up a terrible bray. The judge, who was in a half doze, suddenly turned to Mr. Wood and cried out:

"Sit down, sit down, 'Old Timber,' I say sit down; only one at a time, if you please."

THE New York *Sun* relates the following stories of the late William F. Howe, the celebrated New York criminal lawyer:

Several years ago he was held up by two footpads on a dark night. While one of the men was going through his pockets Mr. Howe exclaimed:

"Dickey the Brute, I didn't think this of you after all I have done for you." The man addressed peered into the lawyer's face and exclaimed, "Why, you're Howe the lawyer."

The fellow turned to his companion and said, "Let him go, Jack; you will want him to lie for you some day as hard as he did for me when he got me off twenty years sure."

Mr. Howe, with a smile on his face, recently told what he said was the greatest compliment he had ever had paid to him by a client. He said that a few weeks after he had secured the acquittal of a man on a charge of burglary, the man sent for him, telling him he was once more in the Tombs Prison.

"I went to see him," said Mr. Howe, "and asked him what he was doing in jail again, after promising me he would never commit another crime. [Mr. Howe smiled as he said 'commit another crime']. The man said:

"Well, you see, Mr. Howe, I enjoyed your speech so much last time, and it did me so much damned good to see you knock out that lying District Attorney, that I just couldn't keep my word to you."

THE recent meeting of the Court of Brotherhood and Guestling, carries the mind back through long years of stress to periods when the Cinque Ports were most essential portions of the national scheme for self-defence. In recent years statutory powers have largely curtailed the judicial duties once belonging to this ancient corporation; but the Court of Brotherhood and Guestling still remains in a somewhat nebulous form, the object of its existence having practically ceased to have any being. The very title of this once important court indicates to those who are interested in ancient constitutional arrangements the vital distinctions subsisting between the five ports and two ancient towns and their so-called "limbs." The Brotherhood was a conference of these seven towns as to the provision of the necessary ships and as to ar-

ranging for the herring sale at Yarmouth, and for other such purposes. The Guestling was rather a wider meeting, at which not merely the Brotherhood, but deputies from the other associated towns were present for the discussion of subjects of common interest to them all. The speaker at these meetings is the head officer of the town which in any given year happens to be the one from which, in orderly succession, the same has to be chosen. — *The Law Times*.

It is told of the late Senator Matt Carpenter that one day while chatting with friends in a committee-room the conversation turned on the relative merits of religious sects. Nearly every member of the party belonged to some church, and there had been an animated discussion, Senator Carpenter pacing up and down, listening intently enough, but saying not a word.

"What church do you belong to, Carpenter?" asked one.

"I don't belong to any."

"Why don't you join one?"

"I don't want to. None exactly suits my views."

"What one would you join, if you were to feel forced to a choice?"

"The Catholic, by all means."

"And why the Catholic?"

"Because they have a purgatory, and that's a motion for a new trial." — *The Omaha Bee*.

To the question, "What is fair criticism?" few stranger answers have been given than the verdict of the jury in the case of *McQuire v. the Western Morning News*, decided in the King's Bench Division before Mr. Justice Ridley on Monday. The *Western Morning News* published a criticism on a play which was recently performed at Plymouth. The critic pronounced the play to be bad. It was described as "nonsense, of a not very humorous character;" it "would be very much improved had it a substantial plot," and if a good deal of the "sorry stuff" were taken out of it; the singers were said, with one exception, to have no voices, and some of the songs were characterised as "common, not to say vulgar." The plaintiff complained that such criticism was libellous, and that in consequence of its publication his play, with which he had been touring the provinces



for five years, had to be withdrawn. It was stated that the *Western Morning News* two years ago had favourably criticised the play, and that the plaintiff's receipts on that occasion were £202 for a six-nights' run, whereas on the second occasion he took only £118. That, of course, might be the experience of almost any play; the plot and dialogue, for instance, might very well have gone out of fashion after five years. There was no serious attempt made, so far as it is possible to see, to prove that in some respects the play was not vulgar. Nor was it alleged that the libel was malicious; it was merely pleaded that the critic's verdict—which, at all events in regard to the quotations from the play read in court, was amply justified—had affected the plaintiff's takings. Whereupon the jury found for the plaintiff damages £100.—*The Spectator*.

AN interesting article might be written on the mottoes, or "posies," as they were called, of Serjeants' rings—interesting because there, in the favourite maxim of each great lawyer, we get at the dominant principle which inspired his career, the mainspring of his activities. *A Deo rex, a rege lex*, was the appropriate choice of the time-serving Jeffreys; *Sat cito si sat bene*—how well it sums up Lord Eldon, and *Tenax Justitiæ* Lord Justice Lush! Blackstone's chosen motto was *Secundis dubiisque rectus*, and it was equally characteristic of him. In the lecture-room, as on the Bench, he was strict, punctual, punctilious; and what he was himself, that he expected others to be.—*The Law Journal*.

IF one part of Newgate has a more gruesome interest than another, says the *London Globe*, it is the iron door in the Old Bailey, outside which, before public executions were abolished in murder cases thirty-four years ago, prisoners, upon whom sentence of death had been passed, were executed in full view of a disorderly crowd. The last prisoner to pay the extreme penalty of the law in this barbarous fashion was Michael Barrett, who was executed for complicity in the Clerkenwell explosion in 1868. Extraordinary precautions were taken against any further Fenian outrage while Barrett and his fellow criminals were in Newgate, a picked body of police, armed with cutlasses and revolvers,

guarding the outer walls night and day. The large crowds which gathered at nightfall in the Old Bailey whenever an execution was to take place contained the very dregs of London life. On one occasion over thirty thieves were captured within sight of the gallows. But there were people in a better station of life who found a brutal pleasure in witnessing these revolting scenes. As much as £10 was paid for the windows of a shop opposite the prison when Muller was executed for murdering Mr. Briggs on the North London Railway.

THE late Mr. Michael McCartan had a fine store of anecdote resulting from his experiences as a solicitor in county Down. On one occasion he was defending a man named M'Gladdery at petty sessions, who was charged by the police with owning a dog for which he had no licence. The evidence was as clear as daylight, and the justices had no option but to impose a fine. Just as they were announcing their intention of doing so, a man rose up in the body of the court—a rough-looking customer with a hairy rabbit-skin cap in his hand and the usual red muffler round his neck—and said: "Yir 'Anner, yir finin' the wrong man entirely. That dog belongs to my brother-in-law, and this man that yir finin' is my father-in-law. But rather than inform on the husband iv my only sister, I'll pay the fine myself." He then put his hand in his pocket with a great show of eagerness. The justices called him into the witness-box and examined him; but he stuck tenaciously to the story that the man in the dock was his father-in-law and that the owner of the dog was his brother-in-law. The justices were so impressed by the man's earnestness and apparent candour that they changed their minds and inflicted no fine on M'Gladdery. After the case was over, Mr. McCartan, who had witnessed the unexpected episode in a state of amazement, asked his client, M'Gladdery, privately, what was the real meaning of the witness's evidence. "Well, ye see, sir," said M'Gladdery, "the man wuz tellin' the honest truth. About five years ago he married my daughter; so I'm his father-in-law, true enough. Last year my poor wife died, and in October last I wuz married a second time—to his sister; so ye see I'm his brother-in-law as well. That's God's truth, sir." *The Law Times*.

IN the November *Atlantic* Samuel F. Batchelder, in an interesting article on "Old Times at the Law School," gives the following account of the methods of instructions in the early days of the Harvard Law School:—

"Once fairly started on the legal path, the student of those days found the life by no means hard. His text-books were lent to him by the school, the library having a vast stock of duplicates of the standard treatises. These he studied, or not, as he felt inclined. One of the instructors of that golden age admits in his memoirs that though 'a list of books was made up, for a course of study and reading, which was enlarged from time to time, it cannot be strictly said that this course was prescribed, for nothing was exacted.' Lectures began at eleven and ended at one. Usually the same professor occupied the chair for both hours, changing his subject at noon. Saturday was then *dies non*. Of the lectures themselves there were but two notable differences from those of to-day,—a charming tendency, especially in the reign of Story, to wander from the subject in hand into fields of reminiscence and general theory as pleasant and almost as instructive, and the fact that a text-book formed the basis of the work. But this was often lost sight of and overlaid with a colloquial expanding of general rules, putting questions on parallel cases, hypothetical or actual, queries from the students, and expressions of opinion, which must have been surprisingly like a lecture of to-day.

"The conversational method, indeed, seems to have been coeval with the very beginnings of legal instruction in this country. It was used in Reeve's private Law School, begun in 1795, at Litchfield, Conn., and lasting till 1833. This school attained a very high standard of excellence, and over one thousand pupils attended it. Much the same method was also used in Judge Howe's short-lived school at Northampton, Mass., begun in 1823, and of very high character, but collapsing when its ablest lecturer, Ashmun, on whom the instruction devolved almost entirely, accepted the Royall Professorship at Cambridge in 1829. His lectures are remembered for their clear grasp of the subject and the care with which he frequently put his classes through exact and searching oral examinations.

"Despite such individual points of excellence,

the general scheme of instruction at the Law School was for many years in amazing confusion. The courses were designed to cover two years' work; but, apparently on the principle that the law has neither beginning nor ending, only half of them were given in any one year, so that it was entirely luck whether on entering the school you found yourself at the beginning of the course or plunged into the middle of it.

"A considerable offset to this disjointed state of theory was the attention paid to practice in the moot courts. These, if not invented, were certainly brought into great prominence by Judge Story. One was held at least every week, and in the height of the system on Monday, Wednesday, and Friday afternoons. One of the professors presided, and all the students were expected to attend and take notes; though this operation usually consisted in copying down *verbatim* both the briefs, which, in those days of expensive printing, the counsel slowly read aloud from manuscript. The cases were always on agreed facts, often drawn from the actual experience of the presiding justice. Twice a year there were regular trials before a jury drawn from the undergraduates, or sometimes, with a delicate humor, from the divinity students. These affairs were made the occasion for a sort of solemn festival, and the court-room was crowded to its utmost capacity. Many a great name in the history of the Bench and the Bar won its first recognition in these mimic combats. In point of fact, noisy applause and uproarious expressions of approval rather spoiled the sought-for dignified effect of a real court, and were sometimes excessive.

"The law clubs, too, were an important element in the work of the school. They were named for great legal writers,—the Fleta, the Marshall, *etc.* The Coke Club was of immortal antiquity, and usually contained the most brilliant members of the school. The average number of students in a club was from fifteen to twenty. They met in some of the smaller rooms in Dane Hall. On any case there was but one counsel for each side and one judge. The cases were usually those which had been announced for approaching moot courts; so interest and attendance on the latter were always kept at a high level."

## LITERARY NOTES.

MR. RIIS has written the sequel to *How the Other Half Lives* in the volume<sup>1</sup> before us. *The Battle of the Slums* deals with the same problems as did the earlier volume, but "reports progress" in the good work in which Mr. Riis has been so actively and successfully engaged. Great change of conditions for the better has been brought about, — thanks to the good fight put up by the author and his fellow-workers, — yet much remains to be done. Mr. Riis is hopeful for the future. One is impressed here, as in his earlier volume, both with the thoroughness of the writer's knowledge of the life which he describes, and with the earnestness, courage and good sense with which he has gone about his work of bettering the conditions of the slums. The many illustrations add to the interest of the book.

A DECIDEDLY readable book is that which Colonel Alexander K. McClure has given us in his *Recollections of Half a Century*.<sup>2</sup> An active participation for fifty years in public affairs and political movements, and a personal acquaintance with most of the political leaders and other prominent Americans of the time, has given the author a large fund of knowledge from which to draw; and his newspaper training has enabled him to put these reminiscences in attractive form. Much of the charm of the book lies, naturally, in the personal note which comes from the author having been, more or less, "on the inside" of what he describes; yet, as always in such a case, one feels a bit of regret that the writer must exercise a certain discretion, and must omit certain things that would make "mighty interesting" reading. For example, in place of the conventional and unenlightening explanation of Mr. McKinley's yielding to pressure for war with Spain and his absolute change of front on the acquisition of the Philippines, it would be interesting to be told what Colonel McClure really knows of the forces at work. Frankness on such points as this is, however, too much to ask.

<sup>1</sup> THE BATTLE WITH THE SLUMS. By Jacob A. Riis. Illustrated. New York: The Macmillan Company. 1902. Cloth: \$2 net. (xi+465 pp.)

<sup>2</sup> RECOLLECTIONS OF HALF A CENTURY. By Colonel Alexander K. McClure. With portraits. Salem, Mass.: The Salem Printing Company. 1902. (viii+502 pp.)

AN attractive holiday book is Clifton Johnson's *New England and its Neighbors*;<sup>3</sup> the illustrations, which are numerous and good, are by the author. Like most of Mr. Johnson's stories, those in the present volume picture rural life, with occasionally a literary or historic background; the element of variety is not lacking, for the reader is taken from Maine to the Juniata, and from Cape Cod to the White Mountains and the Adirondacks. The author has a keen eye for what is interesting, odd and picturesque in life on the farm and in the woods.

THE latest volume<sup>4</sup> of the "American Sportsman's Library" covers the interesting subjects of salmon and of trout fishing. Dean Sage deals fully with the Atlantic salmon, and William C. Harris even more exhaustively with the trouts of America; while a shorter account of the Pacific salmon is given by Messrs. Townsend and Smith. The book contains much valuable information concerning the habits and habitats of the fish, and even the expert angler may find new suggestions as to tackle and the fine points of the sport.

THERE has been issued by the Macmillan Company an illustrated edition of Winston Churchill's *The Crisis*,<sup>5</sup> which is appropriately called the James K. Hackett edition, since the illustrations are from photographs of the scenes of the play as presented by Mr. Hackett. Of the novel itself nothing need be added to what was said in a review of the book on its first appearance; but of the present edition we may say that the illustrations are excellent.

To mark the completion of the series of *English Ruling Cases*, The Boston Book Company has issued a small volume containing admirable portraits of fifteen of the great English judges, from Sir Edward Coke to Lord Chief Justice Russell.

<sup>3</sup> NEW ENGLAND AND ITS NEIGHBORS. Written and illustrated by Clifton Johnson. New York: The Macmillan Company. 1902. Cloth: \$2 net. (xv+335 pp.)

<sup>4</sup> SALMON AND TROUT. By Dean Sage, C. H. Townsend, H. M. Smith, and William C. Harris. Illustrated. New York: The Macmillan Company. 1902. Cloth: \$2.00, net. (x+417 pp.)

<sup>5</sup> THE CRISIS. By Winston Churchill. With illustrations from the scenes of the play. New York: The Macmillan Company. 1902. \$1.50 net. (xvi+521 pp.)

NEW LAW BOOKS.

A TREATISE ON FEDERAL PRACTICE. By *Roger Foster*. Third edition. Two volumes. Chicago: Callaghan & Co. 1901. (clxxxv + 1655 pp.)

This work in its present form is the result of a process of evolution. The first edition (1890) was exclusively devoted to equity, that being the most important branch as to which the pleading and procedure of the State courts cannot be accepted as a safe guide in the courts of the United States. The book in that early form was so acceptable to the profession that in the second edition (1892) the author enlarged its scope. In that step he received the hearty approval of the profession. There appears now this third edition, which embraces the practice of the Federal courts in civil cases of all kinds—equity, common law, admiralty and bankruptcy.

In addition to the Federal courts of ordinary jurisdiction the work deals with the Court of Claims and the Court of Private Land Claims. It has also chapters on removal of causes, and writs of error and appeals. It continues to give special attention to equity, and on this branch it is useful in the State courts. This peculiarity of the work gives it exceptional value on account of the recent increase in the resort to equitable remedies; and in this connection it is interesting to notice that the modern development of the use of the injunction in labor disputes has been well taken care of in the text and notes. There is an appendix of forms and rules of court. The whole work is, as it ought to be, of a practical nature; but it has scholarly merit, also, and is fully entitled to the favor with which it has been received.

THE BENCH AND BAR AS MAKERS OF THE AMERICAN REPUBLIC. By *W. W. Goodrich*. With portraits. New York: E. B. Treat and Company. 1901. Boards: fifty cents. (65 pp.)

This volume contains an address by Judge Goodrich, of the New York Supreme Court, Appellate Division, delivered on Forefathers' day, 1900, the two hundred and eightieth anniversary of the landing of the Pilgrims. Beginning with the Colonial period, when lawyers were not looked upon with favor—although, as is pointed

out, a few of the leaders, like Winthrop and Bellingham, had been educated for the Bar,—Judge Goodrich considers in turn the later Colonial period, the Continental Congresses, and the Constitutional period, ending in 1789; then the formative period of the country, ending with the Civil War; and finally the National period, coming down to the present time; referring in each period to the movements in which the Bench and the Bar bore a distinguished part, and to the judges and lawyers who were instrumental in the work of upbuilding the Nation. There are in the book portraits of Jay, Jefferson, Marshall and Lincoln.

A BRIEF FOR THE TRIAL OF CRIMINAL CASES. By *Austin Abbott*. Assisted by *William C. Beecher*. Second edition. By *Publishers' Editorial Staff*. Rochester: The Lawyers' Coöperative Publishing Company. 1902. (xx+814 pp.)

This is an excellent working volume for the practitioner whose work lies in whole or in part in the criminal courts. The arrangement of the various topics treated is, so to speak, chronological; that is, the different subjects are taken up in about the order in which they would be reached in the normal progress of a criminal cause carried through to sentence. Roughly speaking, one third of the volume is devoted to the subject of evidence. The statements of propositions of law are concise, and the citations of cases in support of them are, it would seem, sufficiently full.

THE LAW OF DOMESTIC RELATIONS OF THE STATE OF NEW YORK. By *Frank B. Gilbert*. Second edition. By *F. W. Battershall*. Albany: Matthew Bender. 1902. Law sheep: \$3. (xii+349 pp.)

This volume treats of the Domestic Relations Law, the Real Property Law, and the Codes of Civil and of Criminal Procedure, as amended by the legislature of 1902, so far as these laws and codes deal with the subject of Domestic Relations. The important earlier decisions, and all the recent decisions, bearing on these statutes are cited.

Since the first edition was published the most important statutory changes have been that

abolishing the "common-law marriage" provable by cohabitation and reputation, and requiring such marriage to be evidenced by a writing, and that allowing correspondents to intervene in divorce proceedings.

The complete set of forms which is added to the present edition adds materially to its practical value.

#### ELEMENTS OF THE LAW OF REAL PROPERTY.

With leading and illustrative cases. By *Grant Newell*. Chicago: T. H. Flood and Company. 1902. (xii + 438 pp.)

This is a book for the student who wishes to get a bird's-eye view of the wide subject of real property, rather than for the practitioner who desires to study exhaustively some particular question. It is no easy problem to condense in two hundred and fifty pages even the elements of real property; and that Professor Newell has succeeded as well as he has in this task is due in part, doubtless, to his experience as a teacher of law. The last third of the volume is given over to some forty leading cases from various American courts, Federal and State. We note one misprint, on page forty-five, where in a note, Stimson's *American Statute Law* is cited as Stinson's.

#### THE AMERICAN STATE REPORTS. Vol. 86.

Containing cases of general value and authority, decided in courts of last resort of the several States. Selected, reported and annotated by *A. C. Freeman*. San Francisco: Bancroft-Whitney Company. 1902. (1011 pp.)

The cases in this volume are taken from current or recent reports in Alabama, Arkansas, California, Illinois, Iowa, Maryland, Massachusetts, Michigan, Missouri, New Jersey, Pennsylvania, South Dakota, Texas, Virginia, and West Virginia.

The more important notes are those on "Relief in Equity from Forfeitures;" "Unauthorized Alteration of Written Instruments;" "Lien for Purchase Money of Homesteads;" "Constitutionality of Code Amendment or Revision;" "Recrimination as Defense in Divorce Proceedings;" "What is an Abuse of Lawful Process and the Liability therefor;" "Liability of a Property Owner for a Nuisance which he did not create;" "Loss of one Office by accepting

Another;" "What Declarations are Admissible as Dying Declarations and in what Cases;" "When a Bank does not take Title to Money deposited with or collected by it, and the Right to recover such Money upon the Insolvency of the Bank." *De Forge v. Railroad*, 178 Mass. 59, offered the chance (which was not availed of) for an interesting note on X-ray pictures.

#### THE CRIMINAL CODE AND THE LAW OF CRIMINAL EVIDENCE IN CANADA. By *W. J. Tremear*. Toronto: Canada Law Book Company. 1902. Half law sheep. (xl + 934 pp.)

This volume is an annotation of the Criminal Code of Canada, and of the Evidence Act, 1893, as amended to the present time, especial attention being given to the rules of evidence and the procedure in criminal courts. Under the respective sections of the Code and of the Act are cited the important Canadian and English cases; there are also cross-references, which are of material assistance in following up any particular subject. Parallel English statutes are also cited. The volume seems to be a good working law-book.

#### THE WOMAN'S MANUAL OF LAW. By *Mary A. Greene*. Boston: Silver, Burdett and Company. 1902. Buckram: \$1.50. (xvi + 284 pp.)

This Manual is hardly a law-book in the ordinary sense, since it is intended for the use not of the legal profession, but of the layman—or rather woman. The author's object is to present to the woman without legal training the principles of law governing domestic life and such business matters as most commonly claim the attention of women in the care of their own property; necessarily the treatment of the subject is on broad and general lines.

#### PRACTICE TIME TABLE. By *H. Noyes Greene*. Second edition. Albany: Matthew Bender. 1902. Buckram: \$2. (xi + 264 pp.)

As a time-saver this small volume will be of value to the busy New York lawyer, who will find here, under an alphabetical arrangement, the times required for each step in the practice of law in his State. It is, in fact, a convenient digest of the Practice Laws in New York.

By the  
Book Clerk  
of the Court  
of the County  
of the State of  
New York  
in and for the  
County of  
the City and  
County of New  
York

10-  
11-  
12-  
13-  
14-  
15-  
16-  
17-  
18-







